

# Practical Handbook on European Private International Law

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# Practical Handbook on European Private International Law

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# Part I. The Law Applicable to Contractual and Non-Contractual Obligations and Obtaining the Information on Foreign Law

## 1. Introduction

### 1.1. What is European PIL?

Private international law, also called conflict of laws, consists of legal norms that determine three types of issues: 1) which state court has **jurisdiction** in private matters having cross-border implications, 2) which state **law is applicable** in such matters and 3) under which conditions may a foreign decision be **recognised and enforced** in another country. The attribute European indicates its source. By far the most significant of the entities adopting PIL rules in the continent is the European Union. This part of the handbook is intended to provide an overview of the second type of issues, i.e. the EU provisions concerned with the law governing certain legal relationship, which will be called conflict-of-law provisions, or simply, conflicts provisions.

### 1.2 How Does the Problem of Applicable Law Arise and Affect the European Union?

The problem of applicable law occurs because of the disparities between the substantive rules regulating certain issues in different legal systems. The EU Member States are no exception. In the field of contractual and non-contractual matters differences between the Member States national laws may cause problems to business entities since they may be confused as to the law according to which they should act. It has been said that this may create an obstacle to **proper functioning of the internal market**. Cure to this problem entails improved predictability of the outcome of litigation, certainty as to the law applicable and free movement of judgments. This may be achieved if the conflict-of-law provisions in the Member States were to designate the same national law irrespective of the country where the court seized with a case is situated. Since the European jurisdiction provisions in contractual and non-contractual matters

allow choice between two or more venues,<sup>1</sup> the solution has to be found through the unified conflict provisions. Otherwise, the citizens would be encouraged to engage in **forum shopping**, i.e. choosing the courts of one Member State rather than another just because the (private international) law is more favourable there.

### 1.3 The EU Competences and Legal Instruments

Such unified provisions have been initially adopted in a form of international convention, the 1980 Rome Convention on the Law Applicable to Contractual Obligations,<sup>2</sup> after years of drafting and eventually leaving the non-contractual matters out of the Convention scope. In recent years, the EU instruments are being adopted in different fields of private international law, among them the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)<sup>3</sup> and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),<sup>4</sup> the later replacing the Rome Convention. This became possible following the amendments to the founding treaties introduced by the Amsterdam Treaty, which entered into force on 1 May 1999. The new provisions, contained in Article 65(b) of the EC Treaty, enabled the European Community to legislate these civil law matters. A transfer of legislative competences in the field of private international law from the Member States to the then Community is called communitarisation of private international law. This shift from the third to the first EU pillar was intended to facilitate creation of the **Area of Freedom, Security and Justice**, an objective set by the Amsterdam Treaty, put on the political agenda by the 1999 Tampere European Council and reaffirmed in the 2004 Hague programme,

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<sup>1</sup> The part of the handbook related to the jurisdiction issues explains the possibility that a dispute arising out of the same legal relationship is brought before courts in different Member States. For instance, in a dispute concerned with a sales contract (and in the absence of parties agreement to the contrary), the dispute may be brought before the court of defendant's domicile or the court of the place where the goods are delivered or should have been delivered (Articles 2 and 5(1)(b) of the Brussels I Regulation).

<sup>2</sup> OJ L 266/19 (1980).

<sup>3</sup> OJ L 199/40 (2007).

<sup>4</sup> OJ L 177/6 (2008).

followed by the 2009 Stockholm programme. A central feature of this area is judicial cooperation in civil matters and within it mutual recognition of judicial decisions among Member States.

Following the entry into force of the Treaty on the Functioning of the European Union (TFEU)<sup>5</sup> on 1 December 2009, the relevant legal basis is provided in Article 81 (former Article 65(2)(c) of the EC Treaty) subjecting the provisions applicable in the Member States concerning conflict of laws and of jurisdiction to the ordinary legislative procedure. It is additionally provided that the EU competences in the area of freedom, security and justice are shared between the EU and the Member States (Article 4 of the TFEU), meaning that the EU and Member States are authorised to adopt binding acts in these fields. However, Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise or has ceased to exercise its competence.<sup>6</sup>

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<sup>5</sup> It is important to note that pursuant to the TFEU, the word “Community” should be replaced by the word “Union” in the entire EU law.

<sup>6</sup> According to the Opinion 1/03 of 7 February 2006 relating to the conclusion of the new Lugano Convention, the EU Court of Justice confirmed that the Community has acquired exclusive competence to conclude an international agreement like the said Lugano Convention with third countries on matters affecting the rules laid down in Brussels I Regulation. This opinion clarified the issue of the EU external competence to negotiate and conclude bilateral or regional agreements with third countries in civil cooperation matters. The EU may authorise the Member States to negotiate and conclude bilateral or regional agreements with third countries. The procedure for obtaining such authorisation and the matters which may be subject to such authorisation are defined in the Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligation, OJ L 200/25 (2009), and the Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligation, OJ L 200/46 (2009).

## **2. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I)**

The Rome I Regulation is an integral legal instrument dealing with the law applicable in contractual matters<sup>7</sup>.

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<sup>7</sup> The new Civil Code regulated in Article 2640 and the following the law applicable to contractual obligations.

Article 2.640 - Law applicable to contractual obligations

(1) The law applicable to contractual obligations is determined according to the EU law regulations.

(2) In the matters which do not fall within the EU regulations are applicable the provisions of this code on the law applicable to legal act, unless otherwise provided by international conventions or by special provisions.

Article 2.641 – Law applicable to extra-contractual obligations

(1) The law applicable to extra-contractual obligations is determined according to the EU law regulations.

(2) In the matters which do not fall within the EU regulations applies the law governing the substance of the preexisting legal relationship between the parties, unless otherwise provided by international conventions or by special provisions.

Article 2.642 – Responsibility for bringing violations to personality

(1) The claims for reparations based on a violation brought to private life or personality, inclusively by mass-media or by any other public information means, are governed, at the choice of the wounded person, by: a) the law of his habitual residence state;

b) the law of the state in which the damage occurred; c) the law of the state in which the author of the damage has his habitual residence or registered office.

(2) The cases laid down by par. (1) letters a) and b) also impose the condition that the author of the damage should have reasonably expect for the effects of the violation brought to personality to produce in one of these two states.

(3) The right to reply against the violations brought to personality is submitted to the law of the state in which appeared the publication or where the show was broadcasted.

Article 2.643 – Extinction of obligations

(1) Delegation and novelty are submitted to the law applicable to the obligation which forms their object.

(2) The compensation is submitted to the law applicable to the claim to which opposed the extinction, partial or total, by compensation.

Article 2.644 – Multiple debtors

The creditor capitalizing the rights against multiple debtors must observe the law applicable in his relations with each of them.

Article 2.645 – Right of regress

(1) The debtor's right to exercise regress against a co-debtor exists only if the laws applicable to both debts admit it.

(2) The conditions for exercising the regress are determined by the law applicable to the debt which the co-debtor has towards the prosecuting creditor.

(3) The relations between the creditor who was not interested and the paying debtor are submitted the law applicable to the debt of this latter one.



## 2.1 Scope of Application

Pursuant to its Article 1, the Rome I Regulation applies to: 1) contractual obligations 2) in civil and commercial matters 3) when they involve a conflict of laws. As in the preceding Rome Convention, the notion “**contractual obligation**” is understood autonomously and independently from any national concept in order to assure uniform application of the Regulation provisions. It has to be interpreted consistently with the same notion found in the Brussels I Regulation and it should not overlap with the scope of the Rome II Regulation because contractual obligations and non-contractual obligations are strict alternatives. The reference to **civil and commercial matters** indicates that the Regulation does not apply to public law matters, in particular, to revenue, customs or administrative matters.<sup>8</sup> Some civil obligations are still outside the Regulation’s scope such as those related to family matters<sup>9</sup> and

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(4) The right of a public institution to exercise regress is established by the law applicable to its organic state. The admissibility and exercise of regress are governed by the provisions of par. (2) and (3).

Article 2.646 – Payment currency

(1) The payment currency is defined by the law of the state which issued it.

(2) The effects which the currency exercises upon the scope of a debt are determined by the law applicable to debt.

(3) The law of the state in which the payment must be performed determined the currency in which it is to be made, except only if, in the relationships of private international law born from contracts, the parties agreed another payment currency.

<sup>8</sup> Interpretation of the notion of “civil and commercial matters” should be consistent with that of the Brussels I Regulation (Recital 7 of the Rome I Regulation).

<sup>9</sup> It suffices to mention here that the EU has been active in legislation in the field of family conflict-of-laws, including divorce, parental responsibility, maintenance obligations and matrimonial property regimes. The following instruments are of particular relevance: the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/10 (2010); the Council Decision no. 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ L 331/17 (2009); the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7/1 (2009); Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, OJ L 338/1 (2003). Other legal instruments relevant to Romania include certain Hague conventions: the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and

matrimonial property regime, wills and successions,<sup>10</sup> involving the status and legal capacity of natural or legal persons, arising under certain insurance contracts, certain negotiable instruments and trusts as well as pre-contractual obligations, arbitration and choice of court agreements and the issue whether agent may bind principle. Final condition for the Regulation's applicability is a **cross-border element** of the case which is the reason for the issue of applicable law to arise in the first place.

**Territorial scope** of the Rome I Regulation includes all Member States save for Denmark which remains under the Rome Convention regime. For States with several territorial units having separate rules regulating contractual obligations, each territorial unit is considered as a country when determining the law applicable under this Regulation (Article 22). According to the **temporal scope** of application, the Rome I Regulation entered into force on 24 July 2008, but its application is postponed so as to cover only the contracts concluded as from 17 December 2009 (Article 28).<sup>11</sup> It is important to note that the Rome Convention entered into force between Romania, Bulgaria and the other Member States on the 15 January 2008. Thus, the contracts concluded in between 15 January 2008 and 16 December 2009 are under its temporal scope of application.<sup>12</sup>

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Measures for the Protection of Children. There are certain proposed instruments not yet adopted at the EU level such as: the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes {COM(2011) 125} {COM(2011) 127} {SEC(2011) 327} {SEC(2011) 328}, Brussels, 16.03.2011, COM(2011) 126/2, 2011/xxxx (CNS); the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships {COM(2011) 125} {COM(2011) 126} {SEC(2011) 327} {SEC(2011) 328}, Brussels, 16.03.2011, COM(2011) 127/2, 2011/0058 (CNS).

<sup>10</sup> Among proposed EU instruments is also the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession {SEC(2009) 410} {SEC (2009)411}, Brussels, 14.10.2009, COM(2009)154 final, 2009/0157 (COD).

<sup>11</sup> Corrigendum to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/87 (2008).

<sup>12</sup> Council Decision no. 2007/856/EC of 8 November 2007 concerning the accession of the Republic of Bulgaria and of Romania to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, OJ L 347/1 (2007).

The provisions on **relationship with other legal instruments** give priority to international conventions in the field to which one or more Member States are parties at the time when the Rome I Regulation is adopted, except when such conventions are concluded exclusively between the Member States. In the latter case, the priority is given to the Rome I Regulation (Article 25). Among the Hague conventions which take precedence are: the 1955 Convention on the Law Applicable to International Sales of Goods (Denmark, Finland, France, Italy and Sweden) and the 1978 Convention on the Law Applicable to Agency (France, the Netherlands and Portugal).

The Rome I Regulation applies universally or *erga omnes* meaning that it is irrelevant whether the law of a Member State or a non-Member State is designated as applicable (Article 2). It also excludes *renvoi*, so that the reference to a certain law is a reference directly to the substantive rules of that law (Article 20). This exclusion improves foreseeability in legal relations and harmony of decisions intended by the EU legislator.

## 2.2 General Conflicts Provisions

Preserving the basic principle of the Rome Convention that contractual parties may choose the law governing their transaction (*lex voluntatis*), the Rome I Regulation introduces structural changes in the default rules. According to Article 3, the **autonomy of the parties** is quite wide: the choice of applicable law may be express or tacit, the latter if demonstrated with reasonable certainty by the circumstances of the case, such as the choice of court clause, reference to the specific national legal instrument, use of the form contract typical of certain national legal system, use of terms typical for certain national legal system, etc. Furthermore, the *lex voluntatis* may capture the whole or only a part of the contract and it may occur or be altered at any time. However, subsequent choice of another applicable law may not adversely affect formal validity of the contract or third party' rights. Additionally, the parties' choice of law to govern their contract, which at the time the choice was made was solely connected to a single country (intra-state situations), does not

operate as a choice of law (Ger. *kollisionsrechtliche Verweisung*), but merely as a choice of contract terms (Ger. *materiellrechtliche Verweisung*). This means that legal provisions in the country of sole connection, which are not derogable by agreement (*ius cogens*), always apply. Transferred to the EU level, this principle dictates that in case where all other elements relevant to the situation at the time of the choice are located in one or more Member States without any connection to a non-Member State (intra-Union situations), the choice of a non-Member State law does not prevent the application of mandatory provisions (*ius cogens*) of the EU law.

In Article 4, the Regulation also determines which law applies if there is no agreement between the parties. While inspired by the general objective of the Regulation – legal certainty, the default provisions vary depending on characteristics of the parties or on the object of transaction. A contract for the **sale of goods** and the contract for **provision of services** are governed by the law of the country where the seller or the service provider has his or her habitual residence (*lex firmae habitationis*).

*In 2010, a medical clinic operating and administered in Romania concluded a contract for the purchase of special medical laboratory equipment with a Dutch company producing this equipment. The contract provided for the delivery not later than on 1 February 2010, while the equipment arrived to the medical clinic three weeks later, forcing the Romanian clinic to postpone the provision of these services to its patients. After unsuccessful attempts to negotiate the reduction of price or payment of damages, in May 2012 the Romanian clinic brought an action against the Dutch company before the Romanian courts. The Dutch company stated that the action was time-barred as the time-limitation agreed in the contract was one year after the occurrence of the disputed event, such agreement being permitted under the Romanian law. The Romanian party relied on the Dutch provisions on time-limitation of legal actions which provide for five years from the day following*

*that on which the action accrued, which cannot be subject to any party dispositions in advance. Which law applies to the issue whether this action is time-barred?*

*In sales contracts, the provisions of the 1980 UN Convention on the Contracts for the International Sale of Goods and the 1974 UN Convention on the Limitation Period in the International Sale of Goods have precedence unless parties have excluded their applications. This is because Article 1(1)(a) of the 1980 UN Sales Convention provides that this Convention applies to contracts of sale of goods between parties whose places of business are in different Contracting States, and both the Netherlands and Romania are Contracting States thereof. Nevertheless, not all issues are dealt with in the 1980 UN Sales Conventions, such as the issue of time-limitations for bringing the actions before the courts. The latter issue is uniformly regulated under the 1974 UN Convention, the applicability of which is equally dependant on whether the parties' places of business are in different Contracting States. Although Romania is a Contracting State to the 1947 UN Convention, the Netherlands is not. Thus, further analysis has to be based on the conflict-of-law provisions of the Rome I Regulation. In the absence of the parties' choice of law, the applicable law is the law of the country where the seller's habitual residence is located. The relevant criterion for the seller being a legal person is the seller's place of administration, which apparently is in the Netherlands. Since it is clear from all the circumstances of the case that no other law is manifestly more closely connected to this sales contract under Article 4(3), Dutch law should decide the issue of statute of limitation because Article 12(1)(d) of the Rome I Regulation states that the applicable law also extends to cover the limitation of actions. (If Romanian court were to decide this case the applicable law would have*

*been the same.) (However, if the case concerned a Romanian seller and a Dutch buyer, the issue of the time-limitation of the action would fall under the 1974 UN Convention because Article 3(1)(b) of this Convention provides that its provisions apply if the rules of private international law make the law of a Contracting State applicable to the contract on sale.) (Additional note is made here regarding the 1955 Hague Convention on the Law Applicable to International Sales of Goods which would apply in case the proceedings were brought before the court of any of its Contracting States, among which are some EU member States listed above under 2.1.)*

However, law of the country where the auction takes place applies to sale by auction. A **franchise** contract and a **distribution** contract are governed by the law of the country of the franchisee's or distributor's habitual residence, respectively.

*In October 2010, a Romanian car producer entered into a distribution contract with a Greece-based company for distributing its cars in Greece. The distributor failed to comply with the contractual obligations and to sell the minimum cars agreed and did not pay the contractually agreed fixed monthly amount for six consecutive months. The producer sued the distributor before the Greek courts to recover the due sums. In its defence, the distributor claimed that his failure to pay is due to the economic situation in the country which presents the ground to rely on the rebus sic stantibus, while the producer claims that this is not the case because the situation is not excessively onerous and the distributor must have been aware of the market situation when concluding the contract. Under which law should this issue be decided by the Greek courts?*

*Given that the facts do not reveal any choice of law by the parties, either explicit or implicit, the provision relevant for*

*the purpose of establishing the law applicable to the distribution contract is contained in Article 4(1)(f) of the Rome I Regulation which provides for the applicability of the law of the country where the distributor has his habitual residence. In the case at hand, the place of distributor's central administration is presumably in Greece; hence the law applicable to this contract, including the issue of frustration of the contract (teoria imprevizunii) is Greek law. The circumstances of the case at hand are not such to make it clear that another law is manifestly more closely connected to this distribution contract under Article 4(3). (Needless to say, if the Romanian court was to decide the case, the result of the conflict-of-laws analysis would be the same.)*

A contract concerning a **right *in rem* in or a tenancy of immovable** property is subject to the law of the country where the property is situated (*lex rei sitae*), except in case tenancy envisages temporary private use for no more than six consecutive months and a tenant is a natural person. In a latter case the applicable law is that of the country where both the landlord and the tenant have their habitual residences.

*A Romanian student applied for the Erasmus exchange program at the University of Milan in Italy and was accepted to spend one semester there. The student found a studio apartment in one of the Milan quarters and concluded a tenant contract with a landlord of Italian nationality and residence. The contract was for the period from 1 February to the 31 May 2011. Two weeks upon arrival the student accepted another student in the apartment to share the expenses, which was opposed by the landlord stating that it is up to the landlord to always give such permission. The landlord sought legal advice concerning the law which is applicable to the tenancy contract.*

*The attorney based in Milan first verified whether the parties have chosen the applicable law. If not, the attorney checked whether habitual residence of each of the two parties is in the same country, given that the tenancy contract is for the period of less than six months and the tenant is a natural person. If the attorney found this not to be the case, the next cascade connection is the law of the country where the property is situated, i.e. Italian law. The final check to be made under Article 4(3) is whether all the circumstances of the case make it clear that another law is manifestly more closely connected to this tenancy contract. The relevant circumstances in this case do not clearly point to any other law as manifestly more closely connected than Italian law.*

Specific contracts relating to certain **financial instruments traded in multilateral systems** are subject to the special conflict rule which points to the law of the country under whose non-discretionary provisions such system operates.

For contracts other than the mentioned ones or those covered by more than one of the mentioned relationships, the applicable law is determined by reference to the country where the party required to effect the **characteristic performance** has his or her habitual residence (Article 4(2)). This entails answers to two questions in a specific case before the court: which party affects the characteristic performance and where the habitual residence of that party is. Ascertaining the characteristic performance is based on the assessment of the socio-economic function of the contract in a certain legal system in order to identify the contractual obligation distinguishing that contract from other contracts. As for the habitual residence, there are helpful definitions in the Rome I Regulation. Thus, for a natural person acting in the course of his or her business activity, the connecting factor “habitual residence” is understood as his or her principal place of business, while for a legal person that would be the place of its central administration. However, where a contract is concluded in the course of the operations of a branch, agency or any other establishment, or if the contract performance is



the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence (Article 19). Conversely, the notion of the “habitual residence” for natural person acting outside his or her business activity is not explicitly defined in the Regulation; it is to be autonomously interpreted by the courts.

*A Belgian artist and a French company concluded a contract on creation of a logo for their company and on transferring the intellectual property rights in that logo to the French company. The French company was obliged to make the payment of the fixed amount upon completion of the logo. The company was not satisfied with the logo, while the artist insisted on the performance of the contract. What law is applicable before the Belgian or French courts?*

*In the absence of the parties’ choice of law, and since this contract is not enumerated among those in Article 4(1) of the Rome I Regulation, the pertinent provision is that of Article 4(2) providing for the applicability of the law of the country where the party required to effect the characteristic performance of the contract has habitual residence. The question of characteristic performance has to be decided on the basis of functional analysis of the parties’ main counter-performances. On the one hand, the Belgian artist invests his intellectual efforts, time and certain material resources into creation of the logo protected by an intellectual property right. On the other hand, the French company would have no possibility to lawfully exploit the intellectual property right in the logo without the artist’s permission. Thus, the purpose of creating a logo is to make the company easily identifiable and recognisable on the market and the purpose of transferring an intellectual property right in the logo is to satisfy the need for use of the right protecting the logo. Consequently, under the circumstances of the case at hand*

*the characteristic socio-economic performance is that of the artist. Since presumably the habitual residence of the artist is in Belgium, the law applicable to this contract is Belgian law. There are no circumstances which would enable application of the escape clause under Article 4(3).*

An **escape mechanism** is available if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the country to which any of the above allocations refers to, be it under the provisions for the specifically named contracts or the general provision for all other contracts. The escape clause allows the court to depart from the applicable law determined on the basis of the presumptions set out in the above-mentioned provisions and to eventually apply the law of more closely connected country, but the wording of the provision suggests that it is to be used in exceptional cases only.<sup>13</sup>

Finally, where the law applicable cannot be determined applying the former provisions (such as in the case of a barter contract or a cross-licence contract where obligations are the same, or a joint venture contract where the obligations might be diverse and complimentary so that it is impossible to determine the characteristic performance), the law of the country with which the contract is **the most closely connected** applies. Assessment under this provision is done, first by establishing all the relevant territorial connections for an actual legal relationship (such as parties' habitual residences, place of the conclusion of the contract, places of the performance of the contractual obligations, etc.), and then by weighing those connections to decide towards which country they prevail.

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<sup>13</sup> Strict interpretation seems to be in line with the EU Court of Justice interpretation in the Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV*, related to the escape clause contained in Article 4(5) of the Rome Convention, where the court stressed that it has to be "clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified on the basis of the presumptions".

## 2.3 Conflicts Provisions for Specific Contracts

Contracts for carriage are subject to special conflict rules in Article 5. Unless chosen by the parties, the law applicable to a contract for the **carriage of goods** is the law of the country of carrier's habitual residence, but only if that is also the country where the place of receipt or of delivery or the consignor's habitual residence is located. If not so, applicable is the law of the country where the place of delivery as agreed by the parties is situated. Where it is clear from all the circumstances of the case that the contract for the carriage of goods is manifestly more closely connected with a country other than that which the presumptions point to, the law of that other country shall apply. Like no other escape clause, this also does not affect the *lex voluntatis*.

In this context it is important to refer to the judgment of the EU Court of Justice in the case **C-133/08 Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV**. Although the case refers to Article 4(4) of the Rome Convention, it is relevant here because the Rome I Regulation is the replacing instrument which should assure continuity with the Rome convention to the extent that the concepts and/or provisions are not altered. In the case at hand, the notion of "the contract for the carriage of goods" is used in both instruments. The case concerned a charter party concluded between ICF, on the one side, and Balkenende and MIC, on the other. The contract provided, *inter alia*, that ICF was to make train wagons available to MIC and would ensure their transport via the rail network. Upon failure to receive payment, ICF sued MIC before the Dutch court. The dispute revolved around the issue of whether the claim was time-barred, which in turn depended on whether the contract was categorised as the contract for the carriage of goods or not and thus governed by Belgian law or Dutch law. The Court of Justice rules that the Article 4(4) of the Rome Convention includes contracts the main purpose of which is the carriage of goods, even if they are classified as charter-parties under national law. In order to ascertain that purpose, it is necessary to take into consideration the objective of the contractual relationship and, consequently, all the obligations of the party who effects the characteristic performance. The Court concludes that Article 4(4) applies to a charter-party,

other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods. Furthermore, in regard to splitting the contract the Court of Justice was rather inflexible in that a part of a contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent.

Pursuant to Article 5 of the Rome I Regulation, a contract for the **carriage of passengers** is primarily governed by the law which parties selected among the options listed in the Regulation. The closed list requiring connexity to exist between the chosen law and the contract in question is intended to assure protection to the passengers as the weaker parties. In the absence of such choice, the law of the country of the passenger's habitual residence governs the transaction, provided that either the place of departure or of destination is also situated there. If not so, the law of the country of the carrier's habitual residence applies. Here as well, the Regulation opens a route to escape the application of the law designated by the objective connections if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country.

*After spending some time in Greece, a Danish tourist bought a ticket for the ferry boat to travel from Volos in Greece to Constanța in Romania (through Istanbul in Turkey). The ferry boat is operated by the Romanian company. At the ticket desk in Greece, there was a notice that each ticket purchased for the destination in Romania is subject to the General Terms and Conditions available in different languages at the nearby panel. These General Terms and Conditions provided for applicability of the Bolivian law. When the tourist wished to get on board, he was told that the ferry is already full and that he may take one tomorrow. This caused him expenses because he had to pay for the room in Greece as well as for the room in Romania which he booked in advance. Since the company*

*refused to reimburse him for the additional expenses in Greece, he brought a lawsuit before the Romanian court. Which law is applicable?*

*Being contrary to the provision of Article 5(2) of the Rome I Regulation, the choice of Bolivian law is invalid. In the case at hand, valid choice could have been made by agreeing on Romanian law (the law of the carrier's habitual residence/the carrier's place of central administration/the place of destination), Greek law (the place of departure) or Danish law (the passenger's habitual residence). In the absence of a valid choice of law, this contract for carriage of passenger would be governed by the law of the country of the passenger's habitual residence if either the place of departure or of destination is also situated in that country. However, this is not the situation here, since the passenger's habitual residence is presumably in Denmark while the place of departure is in Greece and the place of destination is in Romania. This leads to the final connecting factor designating the law of the country of the carrier's habitual residence, unless there is basis for application of an escape clause under Article 5(3). Therefore, the applicable law would be Romanian since the carrier has its central administration situated in Romania. (In case the Danish court would be deciding the case, the Rome Convention would be applicable instead and the conflict-of-laws analysis would be entirely different as subject to general provisions).*

Another special category are **consumer contracts** defined autonomously in Article 6 of the Regulation as the contracts concluded by a natural person for a purpose which can be regarded as being outside his or her trade or profession with another person acting in the exercise of his or her trade or profession. However, not all consumer contracts are within the protective umbrella, only those which are not explicitly excluded (Article 6(4)) and which are entered

into under these specific circumstances: 1) the professional pursues commercial or professional activities in the country of consumer's habitual residence, or directs such activities to that country, and 2) the contract falls within the scope of such activities. These circumstances are to be understood coherently with the respective rules in the Brussels I Regulation. In described situations the parties may choose the applicable law but such choice may not deprive the consumer of the protection afforded to him or her by mandatory rules of the law designated under the subsidiary conflicts provision. The subsidiary provision states that consumer contracts entered into under specific circumstances are governed by the law the most familiar to the consumer, that of the country of his or her habitual residence.

*A Romanian hotel receptionist, resident of Romania, received an e-mail message from the Ukrainian company offering to sell him "the original high-quality brand name watches at discount prices". The receptionist replied to the e-mail ordering one of the watches that were described in the offer as a gold watch produced by one of the renowned Swiss watch producers and paid upon the receipt of the watch. In a week, however, the watch became deteriorating as the thin "gold" layer began to peel. Disappointed as he was, the receptionist sent to the Ukrainian company an e-mail message cancelling the contract and requesting the price refund. The company replied that the buyer has no right to cancel the contract under Ukrainian law which the parties agreed on in the contract. Namely, the initial e-mail message offering the watches contained a small-letter provision stating that the seller's General Conditions of Sale, accessible through the link to its webpage, make an integral part of the contract. What law should the Romanian court apply in resolving the dispute on whether the Romanian receptionist is entitled to cancel the contract and recover the paid price?*

*The Romanian court has to first verify whether the contract falls under the special protective provisions of Article 6 of*

*the Rome I Regulation or under the general provisions thereof. Given that the Romanian hotel receptionist is a natural person who bought the watch for his own private use and outside his profession, from the Ukrainian company which acted in the exercise of its trade; this is a consumer contract within the meaning of Article 6(1). Furthermore, it is not listed among the exclusions in Article 6(4). Finally, the Ukrainian company directs its commercial activities to Romania by directly addressing Romanian residents via e-mail and the contract in question was concluded as a result of such activities as required under Article 6(1)(b). Consequently, under Article 6(2) the consumer is shielded from the choice of law which would deprive it from the protection afforded to him by the law of his habitual residence. Thus, the Ukrainian law is only valid to the extent that the Romanian mandatory provisions do not provide otherwise. The court has to verify whether the provision on cancellation of the consumer contract in the Romanian law is mandatory (ius cogens) and, if so, apply this provision to the dispute pursuant to Article 6(2).*

Besides consumers, employees are regarded as weaker parties and their position in an **individual employment contract** is safeguarded by special conflicts provisions in Article 8. Although parties may choose applicable law under primary provision, such a choice of law may not deprive the employee of the protection afforded to him or her by the mandatory provisions of the law that governs in the absence of choice. Subsidiary applicable is the law of the country in which or, failing that, from which the employee habitually carries out his or her work. If it is impossible to determine the applicable law pursuant to this rule, the contract is governed by the law of the country where the place of business through which the employee was engaged is situated. The law applicable by virtue of the objective connecting may be declined if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Related to the individual employment contracts are two judgments of the EU Court of Justice concerned with the interpretation of Article 6 of the Rome Convention which corresponds to Article 6 of the Rome I Regulation. In the first of the two cases, the case **C-29/10** *Heiko Koelzsch v État du Grand-Duché de Luxembourg*, Mr. Koelzsch, domiciled in Osnabrück (Germany), and the international transport undertaking Ove Ostergaard Luxembourg SA, formerly Gasa Spedition Luxembourg, established in Luxembourg, had entered into a contract of employment. Under that contract Mr Koelzsch, was engaged as an international driver for Gasa, transporting the plants from Odense (Denmark) to destinations situated mostly in Germany, but also in other European countries, by means of lorries stationed in Germany, namely in Kassel, Neukirchen/Vluyn and Osnabrück. The contract referred to the Luxembourg labour law, and conferred an exclusive jurisdiction on the courts of that State. Gasa did not have a seat or offices in Germany and its lorries were registered in Luxembourg and the drivers were covered by Luxembourg social security. Mr Koelzsch was elected as an alternate member of the company's work council and soon after his employment contract was terminated due to company restructuring. He challenged the dismissal and claimed damages relying on mandatory provisions of the German law on protection against dismissal, claiming that this is the law that would be applicable in the absence of choice. The Luxembourg courts rejected his claims. He then brought an action for a declaration of liability against the État du Grand-Duché de Luxembourg (State of the Grand Duchy of Luxembourg) arguing that the judicial authorities of that State breached the Rome Convention provisions. In these proceedings the Luxembourg court made reference to the EU Court of Justice on whether in the situations such as in the case at hand the criterion of "the country in which the employee habitually carries out his work" or the criterion of "the place of business through which he was engaged". The Court of Justice held that the former connecting criterion can also be applied in cases where work is carried out in several Member States, as ruled in the earlier EU Court of Justice cases on the Brussels I Regulation. The preference for the former criterion is explained by more adequate protection for the employee who from the socio-economic point of view is regarded as the weaker party in an employment contract. It follows that the first connecting criterion



must be given a broad interpretation and be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities. Hence, in the light of the nature of work in the international transport sector, the courts seized has to determine in which State is situated the place from which the employee carries out his transport tasks and receives instructions concerning his tasks and organises his work, the place where his work tools are situated, the places where the transport is principally carried out and where the goods are unloaded as well as the place to which the employee returns after completion of his tasks.

The second case on individual employment contracts is case **C-384/10 *Jan Voogsgeerd v Navimer SA***. The relevant facts of the case state that at the headquarters of Naviglobe NV, an undertaking established at Antwerp (Belgium), Mr Voogsgeerd entered into a contract of employment of indefinite duration with Navimer SA, an undertaking established in Mertert (Luxembourg). The parties chose Luxembourg law to be the law applicable to that contract. Mr Voogsgeerd served as chief engineer on the ships MS Regina and Prince Henri, which belonged to Navimer, and whose navigation area extended to the North Sea, until he received the notice of dismissal. He sued Naviglobe and Navimer before the Belgian court, seeking a payment in lieu of notice in accordance with the Belgian labour law. In support he claimed that the mandatory rules of Belgian employment law were applicable, irrespective of the choice made by the parties regarding the applicable law. In that respect, Mr Voogsgeerd claimed that he was contractually bound to the Belgian undertaking Naviglobe, and not to the Luxembourg undertaking Navimer, and that he had principally carried out his work in Belgium where he received instructions from Naviglobe and to which he returned after each voyage. Under Luxembourg maritime law damages for the wrongful dismissal of that contract are time barred three months subsequent to dismissal. The Belgian court referred the questions on the interpretations of the connecting criterion of “the place of business through which he was engaged” assuming that in the case at hand employee did not habitually carry out his work in any one country. In the spirit of usefulness, the EU

Court of Justice returned one step back and gave an interpretation of the criterion of “the country in which the employee habitually carries out his work”. Relying on the arguments presented in the former case, the Court of Justice stated that the national court seized of the case must first establish whether the employee, in the performance of his contract, habitually carries out his work in the same country, which is the country in which or from which, in the light of all the factors which characterise that activity, the employee performs the main part of his obligations towards his employer. The Court of Justice further explained that the factors characterising the employment relationship at hand, namely the place of actual employment, the place where the employee received instructions or to where he must report before discharging his tasks, are relevant for the determination of the law applicable to that employment relationship in that, when those places are located in the same country, the court seized may take the view that this place must be considered to be the place where (or from which) he habitually carries out his work.

Rather complex is the special scheme for **insurance contracts** in Article 7 (reinsurance contracts fall under general conflict of law rules). These special rules regulate insurance contracts for large risks situated in or outside the EU and all contracts covering the risks situated within the EU. To simplify, the former are subject to chosen law, or if none is chosen, to the law of the insurer’s habitual residence. The latter are governed by the law chosen from the closed list assuring the connexity between the chosen law and the legal relationship at issue, or in default, by the law of the Member State in which the risk is situated at the time of conclusion of the contract. Where such contract covers risks situated in more than one Member State, for the purposes of determining the applicable law, the contract is considered separated to as many contracts as there are Member States involved.

*A British couple owns a house in the vicinity of La Valetta, Malta where they spend their winters. While in Britain they concluded an insurance contract with the London-based company for the three common household risks: flood,*

earthquake and fire. The contract also included the same risks regarding their house nearby London. The next summer, the house in Malta was damaged by fire from lightning. The couple turned to the insurance company asking for coverage of the damage caused by the fire. The company refused to pay for the damage related to the debris removal which was substantial given that the fire was not immediately extinguished. What law is applicable to the legal action the couple brought before the London court?

The court has to first decide the question of whether this is a large risk or not. This question is decided on the basis of criteria provided in the EU secondary legislation, namely, in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L 228/3 (1973)), as lastly amended by the Council Directive 2006/101/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of freedom to provide services, by reason of the accession of Bulgaria and Romania (OJ L 363/238 (2006)). Under assumption that the contracted risks are not large risks, the governing law in the absence of choice is determined on the basis of the place in the Member State in which the risk is situated at the time of conclusion of the contract pursuant to Article 8(3) in conjunction with Article 8(6) of the Rome I Regulation, pointing to Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services (OJ L 172/1 (1988)). According to Article 8(5), where the contract covers risks situated in more than

*one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State. Given that the risks include flood, earthquake and fire affecting two immoveable properties, the house in Malta and the house in England, the risks are situated where the immoveable is located, i.e. in Malta and in England respectively. Thus, Maltese law would govern the portion of the contract insuring the property in the vicinity of La Valetta, while the law of England and Wales would govern the portion of the contract insuring the property nearby London. (The latter is the consequence of the provision of Article 22(1) of the Rome I Regulation, so the connecting factor in this case does not point to the United Kingdom as a whole, but to the specific territorial unit which has its own rules of law in respect of contractual obligations, the law of England and Wales.) Consequently, the dispute at hand is subject to Maltese law.*

## **2.4 Scope of Applicable Law and Validity of Contract**

According to the non-exhaustive list in Article 12 of the Rome I Regulation, the **scope of the law applicable** to a contract encompasses issues such as its interpretation, performance, and the consequences of breach (to the extent the procedural law of the forum allows) including the assessment of damages in so far as it is governed by rules of law, the ways in which obligations are extinguished, prescription and limitation of actions, and the consequences of nullity of the contract. Pursuant to Article 18, the *lex contractus* also applies if, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof. On the other hand, the mode of proof of a contract or a legal act may be any mode recognized by the law of the forum, or by any of the laws applicable to formal validity if such mode of proof can be administered by the forum. In regard to the manner of performance and the steps to be taken in the event of defective performance which is subject to the *lex contractus*, regard shall

nevertheless be had to the law of the country in which performance takes place.

The rule established under Article 10 states that the *lex contractus* applies to the issue of **material validity**<sup>14</sup>. However, one has recall that questions involving the status or legal capacity are excluded from the scope of the Rome I Regulation. This exclusion is limited by the following provision: When proving lack of consent, a person may invoke the law of the country of his or her habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the *lex contractus*. Additionally, when a contract is concluded between persons in the same country, a natural person may still rely on his or her incapacity under the law of another country, if the other party to the contract was aware of that incapacity at the time of the

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<sup>14</sup> According to the New Civil Code (Law no. 134/2009), the law applicable to substance and formal conditions is regulated by Articles 2637-2639

Article 2.637 – Law applicable to substance conditions

(1) The substance conditions of the legal act are established by the law chosen by the parties or, as the case may be, by its author.

(2) The choice of the law applicable to the act must be express or result from its content or from circumstances.

(3) The parties may chose the law applicable to the entire or only a portion of the legal act.

(4) The agreement on the choice of the applicable law may be amended after the act terminates. The amendments have a retroactive effect, without being able nevertheless to:

a) infrim the validity of its form; or b) to affect the rights acquired by thirs parties meanwhile.

Article 2.638 – Applicable law in the absence of choice

(1) In the absence of choise applies the law of the state to which the legal act is most connected, and if this law cannot be identified, applies the law of the place where the legal act occurred.

(2) Such connections are thought to exist with the law of the state in which the debtor of the characteristic performance or, as the case may be, the authori of the act has on the act occurrence date his habitual residence, commercial fund or registered office.

Article 2.639 – Law applicable to formal conditions

(1) The formal conditins of a legal act are established by the law governing the fund.

(2) The act is nevertheless considered valid from the formal point of view if it accomplished the conditions laid down by one of the following laws: a) law of the place where it was drawn up; b) law of the citizenship or habitual residence of the person who consented it;

c) law applicable according to the private international law of the authority examkining the validity of the legal act.

(3) If the law applicable to the substance conditioof the legal act imposes, undet the nullity sanction, a certain solemn form, no other law among those mentioned at par. (2) can remove this requirement, irrespective of the place where the act was drawn up.

conclusion of the contract or was not aware thereof as a result of negligence (Article 13).

As much as the rules on **formal validity** in Article 11 differ depending on the circumstances or object of the transaction they basically aim at keeping the contract valid. Traditionally, formal validity of a contract concluded between persons present in the same country is governed by the *lex contractus* or the law of the country where concluded, whichever renders the contract valid. A distance contract may be formally valid either pursuant to the *lex contractus*, or to the law of any of the countries where either of the parties is present or had his or her habitual residence at the time of its conclusion. Form of a consumer contract is always subject to the law of the consumer's habitual residence. A unilateral act is formally valid if valid under the *lex contractus*, the *lex loci actus*, or the law of the country of that person's habitual residence at the time when taken. A contract the subject matter of which is a right *in rem* in immovable property or a tenancy thereof has to comply with the requirements of form prescribed by the *lex rei sitae* if by that law 1) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract, and 2) those requirements cannot be derogated from by agreement.

## 2.5 Subrogation, Assignment, Multiple Liability and Set-Off

In case of **legal subrogation** (*cessio legis*), Article 15 provides that the law which governs the third person's duty to satisfy the creditor is applicable also to the issue whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship. On the other hand, the relationship between assignor and assignee under a **voluntary assignment** or **contractual subrogation** of a claim against the debtor is, according to Article 14, governed by the law that applies to the contract between the assignor and assignee under the Rome I Regulation. On the other hand, the law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or

subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

*A Spanish clothing company, as a seller, concluded a contract on sale of clothes with a French company store operating a chain of stores, as a buyer. Subsequently, the Spanish company concluded a two-installment loan contract with an Italian company. The Spanish company, as assignor, assigned all rights, title and interest held by it in and to the contract on sale with the French company to the Italian company, as an assignee, in order to partially fulfil its obligations from the loan contract. The French company did not pay to the Italian company, but to the Spanish company in performance of the sales contract, since it was not timely notified of the assignment. In disputes before a Member State court: Which law is applicable to the issue of which party has the obligation to notify the debtor? Which law is applicable to the issue whether the claim could have been assigned because the sales contract from which the claim arises did not explicitly allowed for the assignment?*

*This first issue is to be resolved under Article 14(1) of the Rome I Regulation which points to the law that applies to the contract between the assignor and assignee under this Regulation. The contract between assignor and assignee here is the loan contract. In the absence of parties' choice of law, the loan contract is subject to the law of the country in which the party effecting characteristic performance has its habitual residence pursuant to Article 4(2) of the Rome I Regulation. The loan contracts enable one party to obtain the needed cash, and the purpose of this particular loan contract was to enable the Spanish company to carry on its business, trade or profession. Without the loan, the Spanish company might be suffering the cash shortage and endanger its business. Therefore, the characteristic performance in the loan contract is that of the lender.*

*Assuming that the Italian company as the lender has its central administration in Italy, the law applicable is the Italian law. The Italian law also survives the test of the escape clause under Article 4(3), as under the circumstances of the contract as a whole no other law seems to be manifestly more closely related to this contract. The second issue falls under the scope of Article 14(2) of the Rome I Regulation which provides that assignability of the claim is governed by the law governing the assigned claim. The assigned claim arises from the sales contract and, in the absence of parties' choice of law and grounds to apply the escape clause, is governed by the law of the seller's habitual residence. In the case at hand that law is Spanish law.*

If a creditor has a claim against **several debtors** liable for the same claim and one of the debtors has satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right of recourse against the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor (Article 16). In cases where the right to **set-off** is not agreed by the parties, set-off is governed by the law applicable to the claim against which the right to set-off is asserted (Article 17).



*A Czech company concluded a contract for the website design services for the amount of €1500 with an Austrian printing company. A few days later, the same Austrian printing company concluded a contract for printing of business cards, flyers and posters for the same Czech company for the price of €1000. When the claim from the website design contract matured and the Czech company claimed payment from the Austrian company, the latter declared set-off on the basis of the claim from the printing contract and only paid €500. The Czech company rejected the possibility of the set-off arguing that the claim from the printing contract has not yet matured. Before Czech or Austrian courts, which law governs the disputed issue? Based on Article 17 of the Rome I Regulation, unless parties did not agree on the set-off, the set-off is governed by the law applicable to the principal claim, i.e. the claim against which the right to set-off is asserted. The principal claim here arises out of the website design service contract, which in absence of parties' choice of law and grounds to apply escape clause, is governed by the law of the habitual residence of the service provider under Article 4(1)(b) of the Rome I Regulation. Assumingly the central administration of the website designer company is in the Czech Republic; hence Czech law is applicable to the service contract. As a result, the law applicable to the set-off is also Czech law.*

## 2.6 Public Interest

In exceptional circumstances, public interests may serve as basis for relying on the overriding mandatory provisions and public policy clause. Unlike its counterpart Rome II, the Rome I Regulation contains in Article 9 the first statutory definition of the **overriding mandatory provisions**: Provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope,

irrespective of the law otherwise applicable to the contract. Consequently, the overriding mandatory provisions are not all provisions which cannot be derogated from by the contractual stipulation (*ius cogens*), but only such mandatory provisions which satisfy additional requirements set out in the definition. While application of such provisions of the forum law may not be restricted, those of a certain country may be given effect only if place of performance is in that country and in so far as those overriding mandatory provisions render the performance of the contract unlawful. The court's discretion to give effect to such rules is guided by the nature and purpose of those provisions and the consequences of their application or non-application. Additionally, the application of a provision of the law applicable pursuant to the Rome I Regulation may be refused under Article 21 if such application is manifestly incompatible with the forum **public policy**.

### **3. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation Rome II)**

Rome II Regulation is a Community instrument intended to provide a comprehensive regulatory scheme for conflicts issues in non-contractual matters.

#### **3.1 Scope of Application**

As defined in Article 1 of the Rome II Regulation, it applies to: 1) non-contractual obligations 2) in civil and commercial matters 3) involving conflict of laws. Difference in relation to the Rome I Regulation scope concerns the first element. The interpretation of the concept of “**non-contractual obligations**” has to be carried out autonomously from any national legal system. Article 2 of the Rome II Regulation states that it includes both the obligations arising out of a tort or delict, and those resulting from unjust enrichment, *negotiorum gestio* (agency without authority) or *culpa in contrahendo* (pre-contractual liability). The Regulation also covers non-contractual obligations that are likely to arise. The concept should be complementary to the substantive scope of the Rome I Regulation so that an obligation cannot at the same time be contractual and non-contractual in nature. Furthermore, it has to be coherent with autonomous interpretations of respective terms in the Brussels I Regulation. In the settled judicial practise of the EU Court of Justice, a negative definition of non-contractual obligation is adopted so that it covers all (civil and commercial) obligations not covered by the notion of “contractual obligations”. To be precise, the phrase “tort, delict or quasi-delict” in the Brussels I Regulation is to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (case C-26/91 *Handte v Traitements Mécano-Chimiques des Surfaces*). Further reference is thus made to the materials dealing with the Brussels I Regulation.

The notions of “**civil and commercial matters**” signify that the Rome II Regulation does not apply to public law matters, including revenue, tax and administrative matters or *acta iure imperii* (Article 1). Besides, the Regulation’s scope does not cover non-contractual

obligations arising out of certain private matters including family relationships, matrimonial property regimes, negotiable instruments, company status, trusts, nuclear damage as well as privacy and personality rights. The last condition for applicability of the Regulation *ratione materiae* relates to the requirement that there must be a **cross-border implication** of the case. Otherwise, no conflict between two or more laws would arise.

**Territorial scope** of the Regulation encompasses all Member States apart from Denmark which did not opt-in. Pursuant to Article 25, where a state whose law is designated by the Regulation conflict rules comprises of several territorial units with own rules on non-contractual obligations, each territorial unit is regarded as a country for the purposes of identifying the law applicable under this Regulation. For instance, if damage has occurred in Glasgow, application of the general rules referring to the place of damage means direct designation of the Scottish law as the legal system of a territorial unit within the United Kingdom, the country with multiple legal systems.

Due to relatively unclear provisions of Articles 31 and 32, the Regulation's **temporal scope** of application has been a matter of interpretation by the EU Court of Justice. In the case **C-412/10** *Deo Antoine Homawoo v GMF Assurances SA*, the confusion was cleared so that the Rome II Regulation applies only to events giving rise to damage occurring after 11 January 2009, while that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope *ratione temporis* of the Regulation.

The scope of the Rome II Regulation is also limited as a result of its **relationship with other legal instruments**. According to the principle *lex specialis derogat legi generali* embodied in Article 27, the special conflict rules in the EU instruments have the priority. The same applies, pursuant to Article 28, in regard to the international conventions to which Member States are parties at the time the Regulation is adopted. Among the Hague conventions these are: the 1971 Hague Convention on the Law Applicable to Traffic Accidents

for 12 Member States (Austria, Belgium, Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia and Spain) and the 1973 Hague Convention on the Law Applicable to Products Liability for 7 Member States (France, Italy, Luxembourg, the Netherlands, Portugal, Slovenia and Spain). These lists, however, in no way affect the operations of the Romanian courts since Romania is not a party to these conventions. What certainly affects the Romanian courts is a further provision which states that the international conventions binding merely between the Member States will no longer be effective.

Similarly to other EU instruments in the field, the Rome II Regulation is based on the *erga omnes* principle meaning that any law designated by the Regulation applies regardless of whether it is the law of a Member State or not (Article 3). For the same reasons as the Rome I Regulation, it also excludes *renvoi* (Article 24).

### 3.2 General Conflicts Provisions

By its conflicts provisions the Rome II Regulation intends to accommodate two often opposing interests: the requirement of legal certainty and the need to do justice in individual cases. To contribute to legal certainty and to respect the contemporary trends of widening the reach of the parties' autonomy in the conflict of laws, Article 14 of the Regulation primarily allows limited option of **choosing the applicable law**. As under the Rome I Regulation, the choice may be expressed or tacit. The limitation specific to non-contractual obligations concerns the time of choice and is intended to guarantee protection to the weaker parties. A choice of law agreement may be entered into only after the event giving rise to the damage occurred, save when all the parties are pursuing a commercial activity when also an earlier agreement will be valid. Another limitation assures that it may not prejudice the rights of third parties. Furthermore, the mandatory rules (*ius cogens*) operate as a limitation to the choice of the law of a certain country in cases where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen (intra-state situations). This principle transferred to the EU level is expressed in a provision that ensures the application

of the EU mandatory rules in cases where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States (intra-Union situations) yet the law chosen is of a non-Member State. In addition to these restrictions to the party autonomy, there are overriding mandatory provisions which affect also the law determined on the basis of objective connecting factors (see ad. 3.6 below). Some other limitations are dependant of the type of the non-contractual relationship; the exclusion of party autonomy covers unfair competition, restraint of free competition and intellectual property rights.

In cases where the parties did not choose the governing law for a non-contractual obligation arising out of a tort or delict, Article 4 designates the law of the country in which **direct damage** occurred (*lex loci damni directi/lex loci laesionis*).<sup>15</sup> This connecting factor is an expression of the belief in the compensatory function of non-contractual liability. The situation in which direct damage arises in more than one country is subject to as many laws as there are places where the direct damage occurred; these laws distributively apply to the respective portions of the non-contractual relationship (mosaic approach). However, this connecting factor does not apply where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs. In such a case the law of **common habitual residence** governs the relationship (*lex firme habitationis communis*).

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<sup>15</sup> It is worth noting here that within the context of the Brussels Convention, the EU Court of Justice already deal with the issue of the distant delicts. Thus in the case C-21/76 *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA*, concerned with the suit by Dutch market gardeners against the French Potassium Mines claiming compensation for damage caused to the plaintiff's crops in the Netherlands by discharge in France of saline waste into the Rhine, the Court of Justice ruled that on the interpretation of the concept of "place where the harmful event occurred" under Article 5(3) of the Brussels Convention. It endorsed the ubiquity principle holding that this concept must be understood as being intended to cover both the place where the damage occurred (*locus damni*) and the place of the event giving rise to it (*locus actus*). In the subsequent case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, also concerned with the interpretation of the same provision, the Court of Justice recognised relevance only to the place of direct consequence of the wrongful act (*locus damni directi*), and not any of the places where the indirect consequences may be felt.

Mentioned fixed provisions are softened by means of the **general escape clause** which enables displacement of the *lex loci damni directi* or *lex firme habitationis communis* with the law which is manifestly more closely connected with the tort or delict in question. As an example of the circumstances in which the escape clause may operate, the Regulation refers to the pre-existing relationship between the parties. For instance, if there is a non-contractual claim on the basis of non-existing contract, the law that would govern this contract may be deemed manifestly more closely related to the claim.

*In 2010, a Romanian national and resident was struck by a car and injured while crossing a road in Hungary. The car was registered in Hungary and was being driven at the time of the accident by a Hungarian national and resident, insured by the Slovakian insurance company. In 2012, the Romanian victim of the car accident brought an action for personal injury and indirect damages before the Romanian court against the Slovakian insurer. Which law applies to this action, e.g. for determining liability and amount of damages? Which law applies to the issue whether the insurer may be sued without recourse against the wrongdoer? Which law applies to the insurer's regress claim against the wrongdoer?*

*Unless the parties agreed on the applicable law after the dispute has arisen pursuant to Article 14(1)(a) of the Rome II Regulation, the applicable law to non-contractual liability arising out of a traffic accident is governed by the general provisions in Article 4. Since the habitual residence of the victim and the wrongdoer are in different countries, Article 4(2) cannot be applied. Thus, the law applicable is determined by the formula pointing to the law of the country in which direct damage occurred. In case of a traffic accident, this country is one in which the place where the accident happened. Given that the accident in the proceedings at hand happened in Hungary, Hungarian law*

*is applicable to the action against the Slovakian insurer (as would be if the Hungarian wrongdoer was sued). Under the circumstances of the case, there are no grounds for application of the escape clause in Article 4(3). In response to the second question, the victim has the right to bring his or her claim directly against the wrongdoer's insurer for compensation if such right exists under either the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides. In the case at hand this is only the Hungarian law because Hungarian law is both the law applicable to non-contractual obligation as explained above, and the law which governs the insurance contract. The latter is established in the case at hand pursuant to Article 8(3) and (4) of the Rome I Regulation, which has specific provisions for an insurance contract covering risks for which a Member State imposes an obligation to take out insurance, such as a motor vehicle insurance imposed by the country of registration. The third question of insurer's regress claim against the wrongdoer-policyholder is in essence the issue of legal subrogation which is resolved under Article 19 of the Rome II Regulation in junction with Article 15 of the Rome I Regulation. They provide that the law which governs the insurer's duty to satisfy the victim is applicable also to the issue whether and to what extent the insurer is entitled to exercise against the wrongdoer the rights which the victim had against the wrongdoer under the law governing their relationship. Thus, the insurer's regress claim in this case is thus governed by the Hungarian law as the law which governs the insurer's duty to satisfy the victim. (In situations in which the case was brought before the courts of any of the Member States which are also Contracting Parties to the 1971 Hague Convention on the Law Applicable to Traffic Accidents, the applicable law would be determined on the basis of the provisions of this Convention.)*



### 3.3 Special Provisions, including practical cases

General conflicts provisions are not applicable to the torts or delicts which, due to the interests involved, require special connections. One of them is **product liability** where the cascade system provided for under Article 5 contains connecting factors to be applied in the following cascade order: country in which the person sustaining the damage had his or her habitual residence when the damage occurred, the country in which the product was acquired, and the country in which the damage occurred, all relevant only under further condition that the product in question was marketed in that same country. Priority, however, belongs to the law chosen by the parties, and in cases they fail to do so, to the law of common habitual residence of the victim and the producer. Laws applicable on the bases of objective connecting factors (which do not include the party autonomy) will not apply if the producer could not have reasonably foreseen the marketing of the product or the product of the same type in a respective country. This “foreseeability clause” balances the risk between the producer and the victim, while the flexibility is assured by the possibility of relying on the special escape clause, identical to the general one.

*An Irish national and resident suffered from a serious medical condition on which occasion he was implanted with a drug-coated stent while treated in the state hospital. The stent was produced by a United States company and imported in Ireland by an Irish importer. Few months after the implantation the patient developed a blood clot causing him severe additional medical problems. The Irish patient is convinced that the stent was defective and decides to sue the stent producer for damages before the Irish court. Which law applies to this dispute?*

*This obligation is to be characterised as a non-contractual obligation arising out of damage caused by a product and falls under Article 5 of the Rome I Regulation. Since the victim and the wrongdoer do not have their habitual*

*residences in the same country, one need further than the next level in the cascade which designates the law of the country in which the victim had his habitual residence when the damage occurred, provided that the product in question was marketed in that same country (Article 581)(a) of the Rome I Regulation). Since the patient has his habitual residence in Ireland and the stent was marketed in Ireland, the applicable law is Irish. There do not seem to be circumstances that would allow for use of an escape clause under Article 5(2). The situation would have been different and would result in applicability of US law under Article 5(1), if the producer could not have reasonably foreseen the marketing of this stent or a product of the same type in Ireland.*

Another category of special provisions in Article 6 involve non-contractual liability arising out of unfair competition and acts restricting free competition, where party autonomy is excluded. In the situation of **unfair competition** applicable is the law of the country where the competitive relations or the collective interests of consumers are, or are likely to be, affected. This, however, does not cover the situations in which an act of unfair competition affects exclusively the interests of a specific competitor, which fall under the general rules.

*A food producer established in Cyprus had a commercial made and broadcasted in Germany and Austria in which it non-objectively compared the essential features of its olive oil to olive oils produced by Italian companies, stating that the latter are not extra-virgin oils even when indicated on their label and that they are generally not even produced from Italian olives. The association of Italian olive oil producers applied before the German court for an injunction to order the Cypriot company to stop broadcasting the disputed commercial. Which law is applicable to the dispute?*

*This tort of prohibited comparative advertising is to be characterised as unfair competition within the meaning of Article 6(1) of the Rome I Regulation. Hence, the law of the country where the competitive relations or the collective interests of consumers are affected is applicable, unless the act of unfair competition affects exclusively the interests of a specific competitor which falls under the general conflicts provisions. In the case at hand it is not only the interest of a specific competitor that is affected, but the competitive relations as well as consumers' collective interest in Germany and Austria where the commercial was broadcasted. Thus the laws of Germany and Austria are distributively applied to the respective portions of the dispute in order to decide whether there are grounds for ordering the injunction.*

A non-contractual obligation arising out of a **restriction of competition** is governed by the law of the country where the market is, or is likely to be, affected. This means that in case where markets of several countries are affected, their laws apply to the respective portions of the obligation (mosaic approach). Given that this may cause complications in practice, the Regulation provides that a single law, that of the forum, may apply if the market of the forum state is directly and substantially affected by the restriction of competition. This decision is left to the sole option of the victim-plaintiff.

A non-contractual obligation arising out of **environmental damage** or damage sustained by persons or property as a result of such damage is primarily governed by the law chosen by the parties (Article 7). Default rule provides that applicable is the law determined on the basis of the general rule on the applicability of the *lex loci damni directi*, unless a victim chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred (*lex loci actus*). The possibility of unilateral choice is established to the benefit of the person suffering damage, but also serves the purpose of promoting general principles of environmental

law endorsed in the EU. This is counterbalanced by the alleged wrongdoer's possibility to assert non-actionability on the basis of rules of safety and conduct in the country in which the alleged wrongdoer acted.

When **intellectual property rights** (such as, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights) are infringed, Article 8 of the Regulation differentiates between national and unitary EU (formerly Community) rights. The infringement of the former is governed by the law of each country for which the protection is sought (*lex loci protectionis*). This rule reinforces the principle of territoriality, which limits the effects of an intellectual property right to the country of its protection and makes it independent from other parallel rights potentially existing in other countries. As a consequence, the number of applicable laws equals the number of countries for which the protection is sought (mosaic approach). In the case of the unitary EU intellectual property rights (such as the Union trademark, the Union design, the Union plant variety right), the territory in which they produce effects is not a single country but the EU as a whole. The principle of territoriality requires that the relevant EU legal instrument is applied. Nonetheless, any question not governed by such an instrument is subject to the law of the country in which the act of infringement was committed. Parties' choice of law is not permitted in cases of intellectual property rights infringements.

The last of the special provisions in Article 9 concerns a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an **industrial action**, whether pending or already carried out. In such cases primarily the general rule pointing to the law of common habitual residence applies. Subsidiary connection points to the law of the country where the action is to be, or has been taken that governs the obligation (*lex loci actus*).

Where damage is caused by an act other than tort or delict, and does not involve intellectual property rights, the Regulation provides special conflict rules distinguishing among **pre-contractual liability**

(*culpa in contrahendo*), **unjust enrichment**, including payment of amounts wrongly received, (*condictio sine causa*) and **benevolent intervention in another's affairs without due authority** (*negotiorum gestio*). The *culpa in contrahendo* is an autonomous concept meaning a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, and includes the violation of the duty of disclosure and the breakdown of contractual negotiations. The conflicts provisions in Article 12 follow a cascade scheme where a succeeding rule applies in default of the former. Thus, for the *culpa in contrahendo* the first step is to apply the law that governs the contract or would apply to it had it been concluded. Failing that, the law of the country of the parties' common habitual residence governs the relationship. Finally, if there is no common habitual residence of the parties, the law of the county of direct damage applies. Both the law of the common habitual residence of the parties and the law of the direct damage may be displaced by the special escape clause where the relationship is manifestly more closely related to a country different from the designated law.

*Two companies, one seated in Estonia and the other in Latvia entered into negotiations concerning the purchase by the former of the latter's production plant. Nevertheless, the Estonian company never actually had an intention of purchasing the plant, but only used this opportunity to obtain specific information about the Latvian company's business models and operations to be able to improve own business and trade. Upon realising the actual motives for negotiations, the Latvian company brought a legal action before the Estonian court seeking compensation of damages caused in the course of sham negotiations. Which law applies?*

*This situation may be characterised as pre-contractual liability within the meaning of Recital 30 of the Rome II Regulation, and under Article 12(1) of the Rome II Regulation the applicable is the law that would govern the*

*contract had it been concluded. This requires turning to the Rome I Regulation. The sham negotiations were concerned with the purchase of a production plant which in commercial reality is a complex contract that may include many different features such as purchase of real estate, purchase of machinery and other equipment and taking over the employees. Thus, in the absence of parties' choice of law, the contract in question would have been subject to the law of the country in which the party affecting the characteristic performance has its habitual residence. In the case of such contracts, the characteristic would be the performance of the Latvian company as the party without whose prior investment and development of the plant would not even exist. Assumedly, the habitual residence of the Latvian party is in Latvia so the law applicable to the putative contract would be Latvian law. The same law would thus govern the pre-contractual liability.*

When any such obligation of the other two types (*condictio sine causa* or *negotiorum gestio*) concerns and is closely related to the relationship already existing between the parties, e.g. contractual or tortious, it is governed by the same law that applies to that relationship (Articles 10 and 11, respectively). If this is not the case, applicable is the law of the country of common habitual residence of both parties at the time the event giving rise to damage occurs. If this does not lead to the applicable law, reference is made to the law of the place where unjust enrichment took place or where the act of intervening in another's affairs is performed, respectively. Any of the former allocations may be bypassed relying on the special escape clause using the criterion of manifestly more close connection with another country.

*In executing a payment of a fee for a conference in Italy to the account of the Italian institution organising it, a Romanian national and resident made a typing error while filling in the bank transaction form so the fee is paid to the*

*account of a third party not at all related to the Italian or the Romanian parties. The third party is an Austrian national and resident having an account at the same Italian bank as the Italian institution. The Romanian party would like to recover the amount paid by mistake to the Austrian party's account. Which law would be applicable before the Austrian court?*

*This situation may be subsumed under the notion of unjust enrichment in Article 10 of the Rome II Regulation. The first cascade in determining the applicable law presupposes a contractual or non-contractual relationship existing between the parties, which are closely connected to the unjust enrichment. Given that in the above described situation, there was no existing relationship between the two parties in the relationship of unjust enrichment, the Romanian party and the Austrian party, the next cascade factor in Article 10(2) refers to the common habitual residence of the parties in question. Neither this connecting factor resolves the issue of applicable law as their habitual residences are presumably in Romania and Austria. The last of the connections in Article 10(3) points to the law of the country in which the unjust enrichment took place. In the case at hand, this leads to Italian law, as the Austrian party's bank account is situated in Italy. The availability of the special escape clause in Article 10(4) does not affect the applicability of Italian law, as the circumstances of the case do not clearly demonstrate that another law is manifestly more closely related to the case.*

### **3.4 Scope of the Applicable Law**

According to Article 15, the law applicable to non-contractual obligations under the Rome II Regulation governs number of issues including, but not limited to, the basis and extent of liability, delictual capacity, liability for the acts of another person, the grounds for

exemption from liability, any limitation of liability and any division of liability, the existence, the nature and the assessment of damage or the remedy claimed, the issue whether a right to claim damages or a remedy may be transferred, including by inheritance, persons entitled to compensation for damage sustained personally, the manner in which an obligation may be extinguished, and rules of prescription and limitation. To the extent that it falls within the powers conferred on the court seized by its procedural law, the *lex causae* also applies to the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation. Other matters of procedure fall under the *lex fori*. The issue of formal validity of a unilateral action related to a non-contractual obligation is treated separately in Article 21 and such validity exists if it is recognised under either the *lex loci actus* or the *lex causae*.

### 3.5 Subrogation, Direct Action and Multiple Debtors

**Subrogation** is subject to the same conflicts provision that applies to the legal subrogation in the Rome I Regulation (Article 19). Such situations regularly occur where the insurance company paid damages to the victim on the basis of the insurance contract with the wrongdoer. The person suffering damage may bring the **claim directly against the insurer** of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides (Article 18). If a creditor has a claim against **several debtors** who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor (Article 20).

### 3.6 Public Interest

A possibility to depart from the law determined on the basis of the aforementioned conflicts provisions is justified on the basis of public interest, and it may operate via different conflicts mechanisms. Thus, the application of a provision of the law of any country specified by



the Rome II Regulation may be refused under Article 26, only if such application is manifestly incompatible with the **public policy** (*ordre public*) of the forum. This provision may be relied on to discard the law whose effect would be awarding non-compensatory exemplary or punitive damages of an excessive nature. In addition, the law applicable by virtue of the conflicts provisions may have to give way to the **overriding mandatory provisions** of the *lex fori* to the extent that the latter demand their application irrespective of the law otherwise governing the non-contractual relationship (Article 16). Finally, there are **rules of safety and conduct**. Such rules in force at the place and time of the event giving rise to the liability may be taken into account as facts and in so far as appropriate in assessing the conduct of the person claimed to be liable (Article 17).

#### 4. Obtaining the content of foreign law

In addition to national procedures for obtaining the information on the content of the applicable foreign law, the EU Member States have two additional venues to that effect: the European Judicial Network and the 1986 London Convention.

##### 4.1 European Judicial Network

Effective judicial cooperation between Member States in civil and commercial matters is a crucial precondition in the process of strengthening the area of freedom, security and justice for all the citizens of the EU. In that context, central role belongs to the European Judicial Network in Civil and Commercial Matters, created by the Council Decision No. 2001/470/EC of 28 May 2001, establishing a European Judicial Network in Civil and Commercial Matters,<sup>16</sup> amended by the Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009.<sup>17</sup> These instruments apply in all Member States except for Denmark.

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<sup>16</sup> OJ L 174/25 (2001).

<sup>17</sup> OJ L 168/35 (2009). Other legal instruments enhancing cross-border cooperation between national civil courts include: the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324/79 (2007) and the Council Regulation (EC)

Under Article 2 of the Decision, the European Judicial Network is composed of: 1) **contact points** designated by the Member States, 2) **central authorities** nominated by certain EU legal instruments, instruments of international law to which the Member States are parties or domestic laws in the area of judicial cooperation in civil and commercial matters, 3) **liaison magistrates**, and 4) **other judicial or administrative authorities** with responsibilities having responsibility in the field of judicial cooperation in civil and commercial matters (such as courts), whose membership of the Network is considered useful by Member States. Since 2009, the network was opened to professional associations representing, at national levels, legal practitioners directly involved in the application of Community and international instruments concerning judicial cooperation in civil and commercial matters, such as attorneys-at-law, solicitors, barristers, notaries and bailiffs.

Article 3 of the Decision provides that the Network has two specific tasks: 1) to facilitate judicial cooperation between Member States in civil and commercial matters by setting up an information system for members of the Network and 2) to facilitate access to justice by providing information on EU and international judicial cooperation instruments. The Network also facilitates the smooth operation of procedures having a cross-border impact and the facilitation of requests for judicial cooperation between the Member States, in particular where no EU or international instrument is applicable. Moreover, the Network is active in the establishment, maintenance and promotion of an information system for the public on judicial cooperation in civil and commercial matters in the EU, on relevant EU and international instruments and on the domestic law of the Member States, with particular reference to access to justice. The main source of information should be the Network's website containing up-to-date information in all the official languages of the institutions of the Union,<sup>18</sup> Last but not the least, the Network supports the effective and practical application of EU instruments or conventions in force between two or more Member States, by

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No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174/21 (2001).

<sup>18</sup> This website is: [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm).

enabling the courts or authorities which need to apply the law of another Member State, to use to the Network to **obtain information on the content of the applicable law**. The latter is one of the many functions of the contact point in each Member State. In securing the content of the applicable law of another Member State the contract point may avail itself of the support of any of the other Network members in its Member State in order to supply the information requested. The information in reply to the request for judicial cooperation is not binding upon the contact point, the authorities consulted or the authority which made the request.

Article 8 of the Decision defines the procedure relate to the requests for judicial cooperation. The contact points, as active intermediaries, have to respond to requests for judicial cooperation within a set time limit (within 15 days of receipt, or thirty days if extended) by using the most appropriate technological facilities provided by the Member States. The Commission keeps a register of the requests and replies of contact points, and regularly supplies the contact points with information on the statistics relating to the judicial cooperation requests and replies.

*In any of the abovementioned cases where the court of a Member State needs to establish the content of the foreign law which is applicable to the dispute, the court may draft a request for judicial cooperation and submit it to the contact point in its own country, which will forward it to the contact point of the country whose law is to be applied. The latter contact point should respond within 15 days, or longer if complex questions are asked. In order to supply the requested information, the contact point to which a request is addressed may rely on other authorities in its Member State. Faster means of communication, such as e-mail messages, are particularly helpful in assuring efficiency of the cooperation system.*

## 4.2 The 1968 London Convention

The 1968 European Convention on Information on Foreign Law signed in London under the auspices of the Council of Europe is another means for obtaining the information on the content of foreign law to apply in a pending case falling within the civil and commercial filed. Each Contracting Party has to appoint national liaison body to receive the requests and to provide a reply, either on its own or by means of another national body or competent person (Articles 2 and 6). As a rule, only judicial authorities are entitled to request the information (Article 3). This request has to indicate the nature of the case, to specify the questions on which information concerning the law of the requested Contracting Party is desired, and to state the facts necessary both for its proper understanding and for the formulation of an exact and precise reply. Copies of documents may be attached (Article 4).

The reply should provide information in an objective and impartial manner. The reply contains relevant legal texts and relevant judicial decisions and may be accompanied by any additional documents, such as extracts from doctrinal works, *travaux préparatoires* or explanatory commentaries (Article 7). The information in the reply is not binding on the requesting judicial authority (Article 8). The reply to the request should be supplied as rapidly as possible, and may be refused only if the interests of the requested Contracting Party are affected by the case in question or if it considers that the reply might prejudice its sovereignty or security (Article 11 and 12). The request for information and annexes have to be in the language or in the official language of the requested Contracting Party or translated to it, while the reply is drawn in the language of the requested Contracting Party (Article 14).

## **Part II Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

### **5. The Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

#### **5.1 Introduction**

##### **Object**

The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Regulation *Brussels I* or RBI) has incidence on:

- a) The establishment of international jurisdiction of the European courts;
- b) The internal reception of judgements from other states of the Union;
- c) The enforcement of such decisions.
- d) Given its broad scope, it has central relevance in the European Union civil and commercial legal framework.

##### **Origins**

At the origin of this Regulation it is the own 1957 Treaty Establishing the European Economic Community that affirmed the objective of eliminating the legal obstacles to the free movement of persons, services and capital in the relations between the Member States. To achieve this goal, it was crucial to overcome the mutual distrust and the fear generated by the lack of knowledge on the foreign rules of jurisdiction and cross-border enforcement of judgements. It was necessary, in this context, to create mechanisms of Private International Law that could allow to overcome such mistrust, precisely in an area where such difficulties assumed major importance for the proper functioning of the Internal Market, i.e., the civil and commercial area.

It was in this framework that the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 27.09.1968 revealed its particular importance of granting

a basic underlying substratum of legal certainty giving rise to the levels of confidence necessary for the formation of intra-EU economic relations.

This convention was converted to the Regulation 44/2001, which represented a decisive step towards the communitisation of Private International Law – envisaged by Article 81 of the Treaty on the Functioning of the European Union (TFEU) and by the previous Article 65 of the Treaty Establishing the European Community – thus changing from the intergovernmental method of the second and third pillars to the Community method of the first pillar.

This Regulation kept, in the essential, the architecture of the aforementioned Convention.

It results from this the validity of the abundant European and national case law on the matter under consideration.

### **States bound**

All EU Member States are bound by the RBI, exception made to Denmark that kept itself out of the integration dynamics in the area of Justice - see Articles 1 and 2 of the *Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community (TEEC)*.

However, its provisions were extended to this Country – see *Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2006/325/EC)*, *Official Journal of the European Union (OJEU)* of 5.5.2006, L120/22.

### **5.2 Jurisdiction<sup>19</sup>**

According with Article 288 of TFEU – ex-Article 249 of the TEEC – this Regulation:

- a) Has 'general application';
- b) Is 'binding in its entirety';
- c) Is 'directly applicable in all Member States'.

This determines that:

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<sup>19</sup> In the Civil procedure Code (Law no. 134/2010) Book VII - International Civil Trial, Title I contains in the art. 1051 – 1067 the provisions related to the international competence.

- a) The application of the RBI does not depend of any mechanism of internal reception and don't allow any derogation;
- b) Its use occurs without the need of any application from the parties – *jura novit curia* – even in States that do not admit this principle.

## **Interpretation**

In the context of a preliminary ruling, the Court of Justice of the European Union (ECJ) interprets the RBI in a binding manner but cannot consider inapplicable some of its rules or go beyond them taking position, for example, about the national laws. Only courts can request the ECJ to give a ruling – see Case C- 24/02, 'Marseille Fret SA'.

### ***Autonomous interpretation***

As regards the interpretation of the Regulation, that the ECJ has showed preference for the autonomous definition of its contents, which means that the most part of the concepts used therein should be interpreted at its own light, under the Community Law, and not according with the national legal rules of the Member States.

This ensures uniform interpretation and application of the RBI, thus granting high legal certainty and facilitating the jurisdictional activity of the national courts which thus can use a set of unambiguous technical notions.

Where, for specific reasons, it becomes particularly difficult to meet the rules of the autonomous interpretation and through them to formulate a unique concept, the ECJ:

- a) Creates a previous rule of conflicts that can determine which national law should define the concept – this technique is being decreasingly used;
- b) Makes reference to a system of private international law of a Member State – for example, the concept of place of performance of the obligation in question referred to in Article 5(1) of the RBI should be defined under the law of the State indicated by the rules of the State where is situated the court before which the case is pending.

The Regulation contains some specific internal solutions that solve, by itself, interpretative problems through the definition of concepts according to the following different forms of indication:

- a) Material definition – for instance providing the notion of 'judgement' – see Article 32;
- b) Reference to a domestic substantive law – for example, with respect to the concept of 'domicile' of natural persons; see the Article 59;
- c) Reference to the private international law rules of a Member State – for instance with regard to the concept of 'seat' of a company, legal person or association – see Article 22(2).

### **Relation to other legal instruments of international law**

The following are the rules for the articulation of the RBI with the texts of international law in force in Member States:

- a) It prevails over the bilateral conventions, replacing them in the area of common scope – Article 69;
- b) As to matters to which the Regulation does not apply, such legal texts continue to apply – Article 70;
- c) With regard to multilateral international conventions governing the jurisdiction, the recognition or the enforcement of judgements concluded before the entry into force of R. 44/2001, these agreements take precedence over the Regulation – see Article 71;
- d) With respect to multilateral Conventions on specific matters, subsequent to the Regulation, in which are parties the Member States, they do not prevail over the R. 44/2001;
- e) It must be taken in consideration the 2007 Lugano Convention (L II), signed on 30 October 2007 by the European Community along with Denmark, Iceland, Norway and Switzerland, that replaced the Lugano Convention of 16 September 1988 (L I). It entered into force in Iceland on the 1st May 2011, in Norway on the 1st January 2010 and in Switzerland on the 1st January 2011. It will be open to future members of the European Free Trade Association (EFTA), Member States of the European Community acting on behalf of certain non-European territories that are part of their territory or for whose external relations they are responsible and any other State, subject to the unanimous agreement of



all the contracting parties – see the Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen – Brussels, 10.6.2009 COM (2009) 262 final.

The Lugano Convention II applies instead of R. 44/2001 and the Brussels Convention in the following cases – Article 54(1)(b) of L I and Article 64(2) of L II:

- a) Where the defendant is domiciled in a State Party of L II, such as Iceland, Norway or Switzerland and the defendant is domiciled in the territory of a State where this Convention exclusively applies;
- b) Where Articles 22 or 23 of L II confer jurisdiction on the courts of such a State;
- c) In cases of *lis pendens* or related actions, L II applies where proceedings are instituted in a State where it is exclusively applicable or in a State where L II as well as an instrument referred to in Article 64(1) apply – particularly RBI and 1968 Brussels Convention;
- d) In matters of recognition and *exequatur*, L II applies if the State of origin or the addressed State don't belong to the EU and is part of this Convention.

### **Application in time**

The Regulation entered into force on 1 March 2002 – see Article 76. It has no retroactive application.

It applies, therefore, to the proceedings brought after this date – being not relevant the moment of the occurrence of the material facts of such proceedings – 'and to documents formally drawn up or registered as authentic instruments after the entry into force thereof' – Article 66(1).

This article, however, contains some transitional provisions allowing that, in proceedings brought before the date of entry into force of RBI, judgments given after that date may be recognized and enforced under the rules of its Chapter III.

In relation to the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia, the Regulation is applicable from their date of accession, which is 01.05.2004.

In Romania and Bulgaria, the RBI is applicable from 01.01.2007.

## **Incidence**

The Regulation 44/2001 is applicable for the determination of jurisdiction in relation to:

- a) Cross-border litigation;
- b) Disputes whose main object is civil and commercial matters.

## **Irrelevant factors**

The Regulation applies independently of other factors such as:

1. Nationality of the parties – this means that it is not exclusively applicable to the nationals of a Member State;
2. Nature of the court whose jurisdiction we try to determine;
3. Type of jurisdiction – the RBI applies even to a claim brought before a criminal court for compensation for losses caused to an individual by a person committing a criminal offence – see the Cases of the ECJ C-172/91 of 21 April 1993, 'Sonntag', and C-7/98 of 28 March 2000, 'Krombach';
4. Subjective structure of the proceeding – RBI applies both to individual proceedings and to collective proceedings – for instance proceedings brought by an association for consumer protection are included – see Case C- 167/00 of 1 October 2002, 'Henkel';
5. Nature of the proceeding – it applies to declaratory proceedings and to enforcement proceedings.

It can be sustained that the Regulation has exclusive applicability to contentious proceedings - namely due to its express references to 'parties' and 'dispute' – see the ECJ Case C-414/92 of 2 June 1994, 'Kleinmotoren'.

## **Types of disputes**

The litigation to which the Regulation applies must have cross-border nature – see Article 81(1) of the TFEU (ex-Article 65 of the Treaty Establishing the European Community – TEEC).

According with the dominant 'Foreign Element Theory', the Regulation applies where the dispute has some external element, whatever that element might be and whatsoever the country to which it might be connected; for this theory, the RBI applies even if the parties involved have the same nationality or have domicile in the same State – see Cases C-346/93 of 28 March 1995, 'Benson' and C-281/02 of 1 March 2005, 'Owusu'.

## **Civil and commercial matters**

The object of the RBI is only civil and commercial matters.

The notion of civil and commercial matters has no relation with the nature of the court or tribunal and corresponds to an autonomous European law concept.

It has been progressively build up by the case-law of the Court of Justice of the European Union (ECJ) – e.g. 'LTU Lufttransportunternehmen GmbH & Co. KG vs. Eurocontrol', 14 October 1976, Case 29/76; 'Netherlands State vs Reinhold Ruffer', 16 December 1980, Case no 814/79; 'Volker Sonntag vs. Hans Waidmann and other', 21 April 1993, Case C-172/91; 'Gemeente Steenberghe vs. Luc Baten', 14 November 2002, Case C-271/00; 'Preservatrice Fonciere Tiard SA vs. Staat der Nederlanden', 15 May 2003, Case C-266/01, and 'Irimi Lechouritou and Others vs. Dimosio tis Omospondiakis Dimokratias tis Germanias', 15 February 2007, Case C-292/05.

This notion is not fixed, permanent and identical in all Regulations. It is under continuous construction and its boundaries are defined according with the specific objectives envisaged by each one and through the consideration of the goals pursued by Article 81 of the TFEU.

The Regulation 'shall not extend to revenue, customs or administrative matters' – Article 1(1).

Are also excluded matters concerning status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills, succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, social security and arbitration.

The ECJ has made a casuistic interpretation of this matter, without formulating a general definition, conceiving broadly civil and commercial matters and interpreting narrowly the excluded matters.

## **Implicit exclusions**

Article 1(1) also performs an implicit exclusion through the use of the expression 'in particular'.

The implicit exclusions materialise where:

- a) The matters involved belong, clearly, to public law;

- b) Such matters belong to the Family Law and require their own forums – see Council Regulation (EC) No 2201/2003, also known as 'Regulation Brussels II bis' (RB2b);
- c) They are already adequately regulated – for example, insolvency, ruled by Regulation 1346/2000, and arbitration, regulated by several international conventions.

Are excluded from the scope of coverage of the R. 44/2001 any dispute between private persons and public authorities acting with their public authority powers – *acta iure imperii*.

The Regulation also applies in matters of:

- a) Donations without succession character;
- b) Trusts and family trusts – fidei-commissum – without succession character;
- c) Labour disputes.

## **Personal scope**

### ***Full application***

The Regulation under analysis applies fully and exclusively to disputes totally connected with the EU, i.e., with those in which the defendant is domiciled in a Member State – Articles 3 and 4.

### ***Partial application***

RBI also applies, partially and not exclusively, to disputes semi-connected with the EU, that is, also containing elements of connection to non-Member State Countries – for example, the defendant is not domiciled in a Member State but there is another kind of connection with the EU, namely because the parties submitted their conflict to the courts of this geopolitical space or because the dispute is exclusively under the jurisdiction of the courts of a Member State – Articles 4(1), 22 and 23.

In the semi-connected conflicts, the jurisdiction of the courts is determined through the internal rules of jurisdiction of each Member State. However, certain provisions of Regulation No. 44/2001 also apply to determine the international jurisdiction of the courts of the Member States of the EU.

## **Applicability**

The Regulation applies to situations connected with the EU, as follows:

- a) Proceeding in which the claimant and the defendant are domiciled in the Union territory – the rules of the Regulation fully apply and the internal rules of the countries where the lawsuit is pending are excluded;
- b) Proceedings where the claimant is not domiciled in the Union and the defendant is domiciled there – the rules of the Regulation shall also apply to determine the international jurisdiction – Judgement of the ECJ, Case C-412/98 of 13 July 2000, 'Josi'; the internal rules of the court are totally excluded;
- c) Proceedings between a claimant with domicile in a Country of the Union and a defendant non domiciled in the EU – are applicable the internal rules on definition of jurisdiction of the country where the application was delivered; however, shall have jurisdiction the courts referred to in Articles 22, 23 24 of the R. 44/2001 – exclusive jurisdiction and prorogation of jurisdiction;
- d) Proceedings where neither the claimant nor the defendant are domiciled in the territory of the Union – to determine the jurisdiction are applicable the internal rules on international jurisdiction of the court before which the proceeding was initiated – Article 4(1); however, are also applicable Articles 22 and 24 – exclusive jurisdiction and jurisdiction based on appearance;
- e) Provisional, including protective, measures requested to a court of a Member State – Article 31 of the RBI is applicable where the measures must be enforced in that State and the jurisdiction is assigned to that court; in this domain, it has no relief the jurisdiction as to the substance of the matter; the domicile of the parties also has no impact for this purpose – Case C-391/95 of 17 November 1998, 'Van Uden'.

### **Operation of the system of assignment of jurisdiction**

A court of a Member States should declare its own jurisdiction if:

- a) It has exclusive jurisdiction – Article 22;
- b) Its jurisdiction emerges from express or tacit indication from the parties – agreement conferring jurisdiction or jurisdiction derived from the defendant's appearance – Arts. 23 and 24;
- c) It is the court of the domicile of the defendant – Article 2;

- d) It is one of the special forums set out in the matter – Articles 5 to 21.

### **Hierarchy of jurisdiction**

To avoid complex difficulties, the Regulation establishes a hierarchy of jurisdictions. This means that some jurisdictions prevail over the other.

The following are the legal criteria that need to be considered:

- a) The special jurisdiction emerging from the subject matter and the domicile don't prevail over the exclusive jurisdiction and the prorogation of jurisdiction;
- b) The prorogation of jurisdiction doesn't prevail over the exclusive jurisdiction;
- c) The special jurisdiction emerging from the subject matter and the domicile are alternative.

### **Exclusive jurisdiction**

The definition of exclusive jurisdiction is done in Article 22. It follows from this provision that, if the subject matter of the dispute is one of the specifically indicated therein, only the forums pointed there have jurisdiction to solve it.

The following are the characteristics of this exclusive jurisdiction – see Case 73/77 of 14 December 1977, 'Sanders':

- a) It is mandatory – which means that the domicile of the parties is irrelevant – see Case C-343/04 of 18 May 2006, 'Land Oberösterreich', and Arts. 4(1) and 22 of the R. 44/2001 – such as it is the express or tacit prorogation of jurisdiction, without prejudice that the parties can choose, at the State indicated by Article 22, a concrete court at internal level; in such a context, it will be the procedural law of the State whose courts have exclusive jurisdiction to assess the validity of the private agreement on jurisdiction or the tacit choice of forum;
- b) Article 22 indicates States since it is a strict sense international jurisdiction rule – see Case C-420/07 of 28 April 2009, 'Apostolides'; it is the procedural law of the State pointed out by Article 22 that selects the court with jurisdiction;

- c) This criteria for the attribution of exclusive jurisdiction stand on the fact that the matters involved are closely linked to the State sovereignty – or, in the terminology of the Case C-261/90 of 26 March 1992, 'Dresdner II', the territory of a Member State; in these situations, the State interest prevails over the private;
- d) The enumeration of art. 22 is exhaustive; the matters indicated are *numerus clausus* and need to be interpreted narrowly because they represent an exception to the general system contained in Regulation – see Cases C-372/07 of 2 October 2008, 'Hassett', 73/77 of 14 December, 1977, 'Sanders', C-8/98 of 27 January, 2000, 'Dansommer', and C-343/04 of 18 May 2006, 'CEZ';
- e) It covers the main questions and the incidental ones – it follows that a court that judges the main question cannot decide the incidental question if another court has exclusive jurisdiction to judge it; in this case, the court that deals with the main question shall declare its own lack of jurisdiction and stay the proceeding until the incidental question is settled; this was defined by the ECJ with the invoked motive of preventing the delivery of irreconcilable judgements – see Case C-4/03 of 13 July 2006, 'Lamellen';
- f) It is denied the recognition if the exclusive jurisdiction rule is disrespected – Article 35(1);
- g) The declaration of lack of jurisdiction is pronounced by the own motion of the court not pointed out by Article 22, called to decide on the subjects listed there – see Article 25;
- h) There is, normally, coincidence between jurisdiction, law and place of execution – given the nature of the matters contained in Article 22 there is, usually, an overlap between the court of trial, the court of enforcement and the nationality of the applicable law.

### **Prorogation of jurisdiction – the forum of express choice**

Article 23 of R. 44/2001 rules the matter of the express agreement on jurisdiction.

In order to this rule be applicable, it is necessary to find, cumulatively, the following requirements:

- a) Parties agreement – a true celebration of an agreement conferring jurisdiction – see Case C-214/89 of 10 March 1992 'Duffryn';
- b) Domicile in a Member State of, at least, one of the parties in the agreement;
  - 1. If this link would not exist, we could not presume that the parties have considered the application of RBI;
  - 2. It applies to agreements between residents in the same Member State, if there is any international element in the dispute;
  - 3. To determine the domicile of the parties, we use the rules contained in Arts. 59 and 60 of the R. 44/2001, which makes possible that one or both parties are domiciled in several states simultaneously.

The agreement on choice of jurisdiction should assign jurisdiction to the courts of the Member States – since it is object of the Regulation the determination of jurisdiction of these courts and not of those of third countries that are strange to this legal text and to its approval.

The object of the agreement should be litigious matters since only this way we can understand the reference to 'disputes', 'parties' and intervention of courts - see Article 23.

The parties in the agreement:

- a) Should refer to future conflicts arising in the context of a legal relationship; if it is defined a false place of performance of the obligations arising from a contract that might be considered as containing an agreement of choice of jurisdiction, it will only be valid if it complies with the provisions of Article 23 – Case C-106/95 of 20 February 1997, 'Mainschiffahrts- Genossenschaft';
- b) Can confer jurisdiction to the courts of a State as a whole or to a specific court; in this case, the choice of forum will be valid if it will be adequate to the provisions of art. 23, even if not conform with the procedural law of the Country to which belongs the court chosen;
- c) Can choose the court that they consider adequate without the need of existence of an objective connection between the forum and the conflict – Case C-159/97 of 16 March 1999, 'Castelletti';



- d) Can celebrate an agreement where they do not choose the court but give the judge the elements needed to identify it – for instance indicating the court of the principal place of business of the transporter – see Case C-387/98 of 9 November 2000, 'Coreck';
- e) May submit the dispute to courts of different States, provided they attribute to each one jurisdiction for the decision of a different question, even emerging from the same legal relationship – see Case 23/78 of 9 November 1978, 'Meeth '; the choice is even valid when the parties choose different courts within the same Member State; likewise, they may confer international jurisdiction to a court in relation to a concrete question of the legal relationship, maintaining as to the others the jurisdiction defined in the R. 44/2001;
- f) Can make an optional choice, agreeing that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise without preventing the access to the courts pointed out by the Regulation;
- g) Cannot define that only one is entitled to apply before the court defined in the agreement while the other can make it before that court or before any other declared as having jurisdiction by the Regulation – Case 22/85 of 24 June 1986, 'Anterist' – since, if the solution was the opposite, it would favour the stronger party in a contract negotiations and would not benefit international trade;
- h) May invoke the agreement, since it is presumed, unless otherwise agreed, the choice of jurisdiction has exclusive character, that is, shows the intention of excluding the jurisdiction of any other court.

To be valid, the agreement on choice of jurisdiction must respect the formal requirements specified in paragraph 1 of Article 23, under penalty of nullity, and cannot be required the accomplishment of other formal demands.

That agreement must, therefore, be concluded:

- a) 'In writing or evidenced in writing; or
- b) In a form which accords with practices which the parties have established between themselves; or

- c) In international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

### **Prorogation of jurisdiction – the tacit choice of forum**

It occurs a tacit choice of forum where the defendant enters an appearance before the court of a Member State chosen by the applicant without contesting the jurisdiction. Such court should correspond to a forum not indicated by the R. 44/2001.

This produces a prorogation of jurisdiction ruled in Article 24 of the Regulation, subject to the following rules:

- a) The appearance is not relevant if another court has exclusive jurisdiction under the provisions of Article 22;
- b) For logical reasons, the dispute must have already been materialised at the time of acceptance of the jurisdiction;
- c) The tacit acceptance of the forum prevails over prior private agreements on jurisdiction; due to this fact, such agreements become void – see Case 150/80 of 24 June 1981, 'Elefanten', and Case 48/84 of 7 March 1985, 'Spitzley';
- d) The appearance is not relevant if the defendant challenges the international jurisdiction or, cumulatively, also plead as to the substance – see the cases indicated in the preceding paragraph and Cases 27/81 of 22 October 1981, 'Rohr', 25/81 of 31 March 1982, 'CHW', and 201/82 of 14 July 1983, 'Gerling';
- e) Article 24 applies only to conferring jurisdiction on the courts of a Member State bound by the Regulation, not requiring the existence of an objective link with such courts;
- f) This Article is only applicable where the disputes are comprehended in the material subject of RBI;
- g) The parties domicile, even in Third Countries, is irrelevant for the application of Article 24 – Case C-412/98 of 13 July 2000, 'Josi'.

The concept of appearance for the effects of Article 24, shall be obtained by calling the national procedural law of the state of the proceeding. The same law also regulates the deadlines involved, particularly to challenge the jurisdiction.

The Article 24 of R. 44/2001 is still applicable to the counter-claim where the applicant (defendant in such a claim) does not challenge the jurisdiction.

### **The forum of the domicile of the defendant**

The attribution of jurisdiction to the court of the domicile of the defendant corresponds to the general rule jurisdiction. This results from art. 2 of the Brussels I Regulation.

Since this rule doesn't emerge from a territorial system, it points out States in which functions the courts with jurisdiction, falling to its domestic law the definition of the concrete court with jurisdiction to resolve the dispute.

This criterion does not operate if the conflict of the parties is the subject of exclusive jurisdiction – Article 22 – or there is an express or implied prorogation of jurisdiction – Arts. 23 and 24.

For the purposes of the *RBI*, each person is treated as a separate defendant.

### ***Determination of domicile***

R. 44/2001 does not impose a material concept of domicile common to all Member States.

This option is justified by the large disparity of internal solutions that made impossible to obtain a negotiated common concept.

However, it fixed some rules for its definition – see Articles 59(1) and (2) and 60.

The choice of domicile by the parties is not permitted by Article 2 of Regulation.

If they celebrate a pact on this matter, it should be considered as an agreement on choice of jurisdiction and not on choice of domicile.

The time for determining the domicile is the time when a court is deemed to be seized.

### **Special jurisdiction**

The special jurisdiction rules are contained in Articles 5 to 21 that define jurisdiction according with the matters of the conflict.

The courts pointed there function as alternative forums in face of the rule of the jurisdiction of the court of the defendant's domicile.

If there is no agreement on choice of jurisdiction, the applicant can bring a legal action against the defendant before a court of the

Member State of his domicile – Article 2 – or of the Member State indicated by the special jurisdiction rules.

### **Jurisdiction on provisional, including protective, measures**

The applicant can ask provisional, including protective, measures:

- a) Before the court of the main case – acting as the court of domicile of the defendant – Article 2 –, before the court of the place of the performance of the obligation – Article 5(1) or, even, before the court indicated by the internal rules of Private International Law – Article 4.; it can be requested any provisional, including protective, measures admitted by the internal law of the Member State where the main action is pending;
- b) Before the court of the Member State where should be performed or enforced the measure – Article 31; in order to apply this Article and to allow the introduction of a provisional measure before the special forum that is the court of the Member State of the enforcement, it is necessary that:
  1. the assets on which it is intended to enforce the measure are situated in the territory of a Member State;
  2. The measure aims to protect rights relating to matters covered by the R. 44/2001 being irrelevant, for this purpose, the subject of the main action and the nature and matter of the provisional measure – Cases C-391/95 of 17 November 1998, 'Van Uden' and 'CHW' (above referred).

The measures in question must be brought before the courts of a Member State, being irrelevant the domicile of the defendant.

### ***Ex-officio* control of jurisdiction**

A court should declare, of its own motion, that it has no jurisdiction:

- a) Where it is seized 'of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22' – see Article 25;
- b) In face of disputes for which the court lacks jurisdiction under the rules of the R. 44/2001 where defendant domiciled in one Member State 'does not enter an appearance' – Article 26(1);

in this situation, the 'court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end' – see paragraph 2 of the same Article.

There is no *ex officio* control of the jurisdiction emerging from private agreements. Where such agreements exist, the court should only analyse the question of its jurisdiction if the party concerned question it.

This is true whether are chosen Member State courts or Third Countries courts – that control is prohibited by Articles 24, 25 and 26(1) of the Brussels I Regulation, as referred by the Case 48/84 of 7 March 1985, 'Spitzley'.

### ***Lis Pendens***

For the purposes of this Regulation, there is international *lis pendens* whenever are brought into courts of different Member States:

- (a) Proceedings included in the subject area of R. 44/2001;
- (b) Characterised by the identity of the parties and of the cause of action – see Article 27.

### ***Relevant notions***

It is important to bear in mind, in this domain, that *lis pendens* corresponds to an autonomous concept of the Regulation – see Cases 144/86 of 8 December 1987, 'Gubisch', and C-406/92 of 6 December 1994, 'Tatry';

Are only comprehended here the cases contained in the material scope of the RBI – see Case C-129/92 of 20 January 1994, 'Owens'; The courts before which are brought the proceedings situated in a *lis pendens* relationship must belong to States bound by the Regulation; however, RBI also applies where one of the courts exercises jurisdiction according to its internal rules, under the terms of Article 4 – Case C-351/89 of 27 June 1991, 'Overseas';

The identity of the cause of action means repetition of facts and legal rules indicated as grounds for the claim – see Cases C-39/02

of 14 October 2004, 'Mærsk', and 144/86 of 8 December 1987, 'Gubisch';

The identity of the parties exists where the same persons are involved in the proceeding, whatever might be their procedural position or domicile, even outside the geographical space of the Brussels I Regulation – See Cases 'Overseas' and 'Mærsk'; if such identity is partial, *lis pendens* is only evaluated as referred to the common parties and the proceeding follows its normal course as to the other – see case 'Tatry'.

### **Legal rules**

Under the provisions of Article 27, 'any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established'.

'Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'.

### **Invocation**

Given the silence of the Regulation, we must conclude that the *lis pendens* can be invoked by both parties and known *ex officio*.

### **Definition of pendency**

For the purposes of the Regulation, the proceeding is pending:

- a) 'At the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant' – Article 30(1);
- b) 'If the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court'; because we are dealing with a private concept of the Regulation, we should not use, in this area, the internal law – Article 30(2); see Case 129/83 of June 7, 1984, 'Zelger'.

## **Related actions**

### ***Concept***

These actions are ruled in Article 28. The European legislator has given us a definition of it in Article 28(3).

### ***Relevant notions***

On this subject, it should be borne in mind that:

- a) We are, again, before a specific concept of European Law – in face of the also autonomous notion of *lis pendens*, are related the actions where there is no identity of cause of action (and of claim, in the Portuguese and Spanish versions);
- b) The related actions must be pending before courts of different Member States bound by the Regulation;
- c) Such actions must be pending before first instance courts – to operate the rule of Article 28(2).

### ***Possible reactions***

In face of the existence of related actions, relevant for the effects of the Regulation, a court can take the following attitudes:

- a) Stay the proceedings – upon application or *ex officio* by any court other than the court first seized – Article 28(1); in the evaluation of the justifiability of this solution the court must consider:
  1. The international jurisdiction of the court first seized;
  2. If the law permits the consolidation of the actions;
  3. The expected pending time of such actions;
  4. The need to grant a quick procedure.

In the final decision to give in its case, the court that stayed the proceeding can consider the solution given by the court first seized;

- b) Decline jurisdiction – any court other than the court first seized can decline jurisdiction 'on the application of one of the parties' – Article 28(2):
  1. If 'the court first seized has jurisdiction over the actions in question' and;
  2. (If 'its law permits the consolidation thereof'.

As indicated in the precept, this is merely an option that, consequently, the court shall exercise freely; it seems clear, for logical reasons, that the operation of this mechanism is only possible if the concept of related actions is also known and accepted by the national law of the court of the first action;

- c) Do not take any of the previous positions.

### **5.3 Recognition and enforcement<sup>20</sup>**

#### **Conditions for recognition**

The R. 44/2001 imposes conditions for the recognition of judicial decisions that must be fulfilled in order to grant its extraterritorial validity and enforceability – see Case 125/79 of 21 May 1980, 'Denilauler'.

Such conditions that need to be automatically controlled are:

- a) The decision object of recognition must be a judicial decision – in the sense that results Article 32; it must be kept in mind, however, that the Regulation is not limited to judgements, since it also allows the recognition of authentic instruments and court settlements – see Articles 57 and 58;
- b) Such decision must have as object matters covered by the scope of the Regulation as defined in its Article 1;
- c) The judgement to recognise must have been given by a court or tribunal of a Member State of the RBI – Articles 32 and 33.

#### **Ways to grant legal effect to foreign judgements**

The provision of effectiveness to judicial decisions pronounced in other States of the Union is obtained, at the Regulations level:

- a) By the process of recognition – Articles 32 to 37, and
- b) By the enforcement subsequent to such recognition or declaration of enforceability – Articles 38 to 52 – which converts the foreign judgement into a valid internal enforcement order.

The recognition which gives internal validity to a foreign judgment may be:

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<sup>20</sup> In the Civil procedure Code (Law no. 134/2010) Book VII - International Civil Trial, Title III contains in the art. 1079 – 1095 the provisions related to the exequatur proceedings.



- a) Incidental – Article 33(1) and (3);
- b) Principal or ratifying – Article 33(2).

## **Incidental recognition**

### ***Characteristics***

The incidental recognition features are:

- a) The possibility of any decision pronounced by courts of the States bound by Regulation be directly invoked before the authorities of another State without any special procedure of recognition being required;
- b) The grant, to the foreign judgement, of the res judicata effect inside of the European Union;
- c) This effect has only relief inside the case in which the incidental question has been raised;
- d) The decision produces the same effects in the Member State addressed as in the State of origin – Cases 145/86 of 4 February 1988, 'Hoffmann', and C-420/07 of 28 April 2009, 'Apostolides'.

### **Requirements for granting**

The requirements for granting incidental recognition are:

- a) Materialization of the recognition requisites (judicial decision and matters covered by Regulation);
- b) Non-existence of any of the grounds for non-recognition indicated in Arts. 34.

Only these requisites can be controlled by the court.

### **Methodology of the recognition**

The incidental recognition of R. 44/2001 meets specific criteria.

Thus:

- a) It cannot involve a review as to the substance – see Article 36 – so are rejected the mechanisms of a recognition review, with new analyses of facts and law; even the mere control of procedural requirements is banished – the Court must only analyse documents and control formal requisites;
- b) It is allowed the recognition of decisions against which an ordinary appeal can still be lodged – Article 37;

- c) The reasons for rejection are exhaustive and can be evaluated by the court's own motion – see Cases 'Krombach' and 'Kleinmotoren'.

### **Reasons for rejection**

The recognition of a judgement can only be rejected:

- a) By contradiction to public policy – 'if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought' – Article 34(1);
- b) If the rights of defence were violated – where the judgement 'was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so' – Article 24(2);
- c) If there is inconsistency with other internal judgement or decision given in another Member State or Third Country – 'if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought' – Article 34(3) or 'if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed' – art. 34(4);
- d) If the judge of the State of origin has not applied the rules on international jurisdiction consecrated in the Regulation in matters of – Article 35:
  - 1. Exclusive jurisdiction – Article 22;
  - 2. Insurance and consumer contracts;
  - 3. Agreements on non-recognition – Article 72.

### **Recognition of a judgement as the principal issue in a dispute** **Concept**

The recognition of a judgement appears as the principal issue in a dispute where any interested party raises the issue of the

susceptibility of a decision to be recognised recognition as the main question in a conflict – Article 33(2).

### ***Characteristics***

This kind of recognition has the following characteristics:

- a) The recognition is the object of the proceeding – were are in the presence of a declarative procedure that aims the definitive recognition of a foreign judgement in a Member State;
- b) 'The application shall be submitted to the court or competent authority indicated in the list in Annex II', according to the Article 39(1). According with the declarations transmitted to the Commission and after the entrance into force of the New Romanian Civil procedure Code (Law no. 134/2010), on the 01.09.2012, the competent court is, in Romania, the tribunal (Tribunalul);
- c) Its only justified where there is doubt about the judgement;
- d) It produces definitive and erga omnes effects, constituting res judicata – which does not happen in the incidental recognition, which is temporary and inter-parties, and not even in the cases of mere granting of exequatur or declaration of enforceability of Article 38;

### ***Legitimacy***

Have legitimacy to seek recognition as a principal issue the parties in the original dispute, his successors or third persons with a legitimate interest.

### ***Declaration of non-recognition***

In the light of the Regulation, nobody can apply for a declaration of non-recognition, since only the positive intervention is comprehended in its text.

In order to achieve a similar effect, the party just needs to oppose the application for recognition as principal issue.

### ***Procedural requirements***

This proceeding follows the requirements laid down in the RBI about the proceeding for the granting of *exequatur*, referred to in Articles 38 to 56, suitably adapted to its specific purposes.

If recognition is denied, the term for the appeal is provided for in the national law, since the Brussels I Regulation has no private rule on this matter.

If it is granted, such time delay is of one month – 'An appeal against the declaration of enforceability is to be lodged within one month of service thereof' – Article 43(5) – according with the Romanian declaration to the Commission, in Romania, the competent court to decide this appeal is the Appeal Court (Curtea de Apel).

## **The Exequatur**

### **General rules**

In order to a decision of another EU Country be enforced in a Member State under the provisions of the Regulation object of this analysis, it is necessary that such decision is subject to a specific procedure to convert it into an enforceable order – Articles 38 to 56. The RBI rules the substance of the *exequatur* and the essential part of the procedure. In the aspects not contemplated, its applicable the procedural law of the addressed State, always under the notion of the purely instrumental function of such rules and impossibility of those rules representing an obstacle to the achievement of the target effect – see Case C-365/88 of 15 May 1990, 'Kongress' and Cases 'Tatry' and 'Apostolides'.

### **Procedural rules**

#### *First instance courts*

At the first instance:

- a) The process runs without the hearing of the opposite party – therefore, there is no discussion on the granting of the *exequatur*; the reasons for this legal solution are:
  1. To produce the necessary surprise effect, in order to ensure the judicial protection of the applicant's rights, namely avoiding that the defendant can sell or hide assets – see Case 'Denilauler';
  2. To respect the presumption that the judgement of the court of the State of origin is regular and according with the law;
  3. To consider that the defendant has already had the opportunity to defend himself in the process of origin.

- b) The exequatur is given in a linear manner, without consideration of the reasons for rejection set out in Articles 34 and 35, after exclusive examination of the documents submitted by the applicant – Arts. 53 to 55 – and fulfilment of certain formalities – arts 39 and 40; the referred documents don't need not be legalized or subjected to other similar formality but, if required by the court of the State addressed, may have to be translated.

#### *Possible outcomes in the First Instance*

- a) Rejection of the request for formal defects;
- b) Total or partial granting of the exequatur – on the matter of the concession of the exequatur limited to parts of a judgment, see Article 48;
- c) Non provision, for lack of fulfilment of the legal requirements.

#### *At the appeal phase*

'The decision on the application for a declaration of enforceability may be appealed against by either party' – Article 43 (1).

In this phase:

1. The procedure is contradictory and subject to the internal law of the State addressed;
2. The appellant can invoke all the grounds for denial of recognition provided for in Articles 34 and 35; to the Appeal court, the grounds for refusal of the declaration of enforceability are the same of the refusal of recognition – see Article 45(1);
3. The court with jurisdiction for this intervention is indicated in Annex III of the Regulation;

#### *Rules on the enforcement of a foreign judgement*

- a) This enforcement is held on the initiative of a party and not by the own motion of the court;
- b) It is made with submission to the internal procedural law of the State where it is requested – Cases 148/84 of 2 July 1985, 'Genossenschaftsbank' and 'Hoffmann'.

## 5.4 Cases

A Romanian enterprise A... celebrates a contract with B..., a company from Copenhagen, Denmark for the acquisition of windmills for electricity production. Those windmills should be delivered by B... at Bucharest. After the first deliverance of the product and payment of 15 windmills, it became obvious to A... that the product didn't have the expected characteristics. In face of this situation, A... goes to the Bucharest court with jurisdiction in civil and commercial matters demanding the annulment of the contract, the restitution of the price paid and the payment of interests. Which rules should the Romanian court apply in order to evaluate its own jurisdiction and which would be the solution for such question?

### Elements for the solution

*Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2006/325/EC), Official Journal of the European Union (OJEU) of 5.5.2006, L 120/22 and Articles 1(1) and 5(1)(a) of Regulation 44/2001.*

C... and D..., two companies from the United States of America bought, together, the Bran Castle, in Romania, in the proportion of one half each. Some months after the buying, they didn't agree on its economical exploration and started to argue the validity of the contract of acquisition. Under this context, C... went before the Brasov Court asking it to declare, against D..., that it is the only owner of the castle since, in spite of what was said in the contract and appears in the title register, it paid, alone, all the price of the property. Analyse the questions of jurisdiction as you should do it you were the judge of the

proceeding.

Elements for the solution Articles 1(1), 4(1), 22(1)(3) and 24 of Regulation 44/2001.

The Cluj Court, in Romania, declares its own exclusive jurisdiction to decide a case where the applicant, the society E..., with statutory seat in that city, asks the declaration of nullity a decision of the general meeting of partners of the company F... on share acquisition.

The same declaration of exclusive jurisdiction is issued by a Munich Court, in Germany, 3 months later, in a proceeding between E... an F... where the question of validity of such decision is also argued. The Munich court justifies its declaration on the fact that the direction seat is in that German city.

How to solve the emerging problem? Can a Spanish court be called to perform the seizure of the physical titles that contain such shares in order to avoid its disappearance?

Elements for the solution Articles 1(1), 22(2), 29, 30 and 31 of Regulation 44/2001.

## **6. The Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

### **6.1 Introduction**

It is under preparation a '*Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*' that is intended to replace the '*COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*' above analysed.

The effort for the creation of a new text emerge from the conviction of European Union Commission that the referred Regulation needs amendments in order to make cross-border litigation speedier, cheaper and more efficient and to reduce the possibilities of using abusive litigation tactics.

Such effort aim to contribute to the materialisation of the orientation given by the European Council in its 2009 Stockholm Programme that asked for the further development of an European area of justice through the removal of the remaining restrictions on the exercise of rights of citizens and companies. In this direction, the most important signal transmitted by the Council was that judgements in civil and commercial matters should be directly enforceable in another Member State without any intermediate measures being required, in harmony with the tendency initiated with the *Regulation Brussels II bis* and continued through the next legislative production – European Enforcement Order for uncontested claims, European Order for Payment Procedure, Small Claims and Maintenance Obligations Regulations.

The facilitation of access to the courts by citizens and businesses with a view to the enforcement of rights throughout the Union and the goal of giving the economic operators tools that could allow them to fully benefit from the single market were fundamental motivations for the leading of this process.

Having in mind that the Brussels I Regulation is the most important legal text of the judicial cooperation in civil matters in Europe, not only for its historical and intrinsic relevance but also because of its residual and subsidiary application, it seems fundamental the



adaptation of its rules to the new dynamics on judicial cooperation that emerged from the Amsterdam Treaty and from the Tampere European Council of 1999 and, especially, to the need for the entire suppression of the existing procedure for recognition and enforcement of judgements, thus installing the full mutual trust between the internal justice systems. This has an enormous relevance considering that, this way, the proposal gives more coherence to the European Law and contributes to giving more credibility to the European Union Justice, rising to a higher level the decisive achievements previously obtained in this area.

### **6.2.1 General objectives**

Such proposal has the general objectives of:

1. Continuing the construction of an European area of justice through:
  - i. The elimination of the remaining obstacles to the free movement of judicial decisions;
  - ii. The improvement of the principle of mutual recognition;
  - iii. The facilitation of cross-border litigation.
2. Helping the recovery of the European economy.

### **6.2.2 Specific objectives**

It is motivated by the specific objectives of:

1. Overcoming the negative effects of the current procedure for recognition of judicial decisions with cross-border elements, namely the ones that emerge from the need for an exequatur;
2. Improving access to justice in the context of disputes involving third countries;
3. Improving the functioning of prorogation of jurisdiction especially in the area of granting information to the defendant policyholder, insured, injured party or beneficiary of the insurance contract, consumer or employee, in the tacit acceptance of prorogation;
4. Improving the relationship between arbitration and judicial proceedings.

### **6.3 Main guidelines**

Its main guidelines are:

1. To grant that a judgement given in one Member State which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability;
2. To enlarge the jurisdiction rules to conflicts against defendants domiciled or habitually resident in a third country embracing situations where the same question is pending in a EU court and in the court of a Third Country;
3. To improve the efficacy of the agreements conferring jurisdiction to a court;
4. To ameliorate the relation between the Regulation and the arbitration;
5. To improve the coordination of the proceedings in the courts of the Member-States;
6. To make better the access to justice in some kind of conflicts;
7. To clarify the conditions under which provisional, including protective, measures may circulate in the EU.

### **6.4 Strategy**

The Commission Staff Working Paper – Brussels, 14.12.2010 SEC(2010) 1547 final – has established that the strategy to achieve the objectives aimed by the proposed change were, essentially, the introduction of the following four main amendments to the Regulation:

1. The abolition of remaining intermediary procedures for the recognition and enforcement of judgements;
2. A general improvement of access to justice for European citizens and companies in international disputes;
3. An enhancement of the effectiveness of choice of court agreements, and
4. An improvement of the relation between court and arbitral proceedings.

## 6.5 Specific amendments

The new text is intended to contain some specific amendments such as:

1. The imposition of a deadline to decide on the jurisdiction question in order to assure that a decision on jurisdiction is taken swiftly by the courts;
2. The improvement of the rule which prevents parallel proceedings in Europe;
3. The imposition of an appropriate communication system between the courts involved;
4. The creation of a forum for claims of 'rights in rem at the place where moveable assets are located';
5. A rule that might allow actions against multiple defendants in the employment area to be brought in a single forum under Article 6(1).

## 6.6 Safeguards

In order to grant the protection of fundamental rights, it was considered that the abolition of the *exequatur* needed to be accompanied by the following safeguard measures:

- a) 'Creation of an extraordinary remedy in the Member State of origin for the defendant who was not informed about the proceedings against him/her in that State';
- b) 'Creation of a second type of extraordinary remedy in the Member State of enforcement which would permit to remedy any other procedural defects which may have arisen during the proceedings before the court of origin and which may have infringed the defendant's rights of defence as guaranteed in Article 47 of the EU Charter';
- c) Enabling 'the defendant to stop the enforcement of the judgment in case it is irreconcilable with another judgment which has been issued in the Member State of enforcement or – provided that certain conditions are fulfilled – in another country'.

## 6.7 Preferred policy options

In the process of building the new legal text, the following policy options were pointed as preferable:

1. 'The existing exequatur procedure would be abolished, thereby permitting judgments to freely circulate within the European Union. The rights of the defendant would be safeguarded by introducing review procedures necessary to ensure the right to a fair trial'.
2. 'The existing rules on jurisdiction of the Regulation would be extended to apply to defendants domiciled outside the EU; moreover, some additional fora would be added which would only apply to third country defendants. Jurisdiction for third country defendants would be fully governed by the regulation but the recognition and enforcement of third country judgments would continue to be governed by national law'.
3. 'The effectiveness of choice of court agreements in favour of EU courts would be increased by reducing the possibilities of abusive litigation. The chosen court would get priority to decide the case even if another court is seized first of the dispute'.
4. 'Arbitration agreements would also be made more effective. Any other court whose jurisdiction is contested on the basis of the existence of an arbitration agreement would have to suspend proceedings on the matter insofar as the question of the existence, validity, or effects of the agreement is brought before the courts of the seat of the arbitration in the Union or before an arbitral tribunal. This will reduce the risk of parallel proceedings and abusive litigation tactics by parties seeking to evade an arbitration clause'.

## **6.8 Targets**

Thus, through these options it was aimed to:

1. 'Remove the remaining barriers for the free circulation of judgments while maintaining a high standard of protection of the rights of defence';
2. 'Ensure equal access to justice as well as the conditions for a fair trial for citizens and companies in the European Union and make sure that weaker parties are not deprived of the protection granted to them by European law';
3. 'Enhance the effectiveness of choice of court agreements concluded in favour of European courts by reducing to a maximum the possibilities for abusive litigation tactics'.

4. 'Avoid parallel court and arbitration proceedings and reduce the possibilities of circumventing arbitration agreements by abusive litigation tactics'.

## 7. The EC Regulation no 805/2004 of the European parliament and of the council of 21 April 2004 creating a European enforcement order for uncontested claims, including cases

### 7.1 Introduction

#### Origins

The *Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims* (EEO) is a product of the special dynamics introduced in the civil and commercial European judicial cooperation by the ***Treaty of Amsterdam*** of 2 October 1997 and, in particular, by the new content given to Articles 61, c), and 65 (a) of the ***Treaty Establishing the European Community*** (TEEC).

To its creation, also contributed decisively the ***Presidency Conclusions of the Tampere European Council*** of 15 and 16 October 1999. Such Council stressed the fundamental importance of a program of enhanced mutual recognition of judicial decisions and judgments that it classified as '*cornerstone of judicial co-operation in both civil and criminal matters within the Union*'. According with it, that program was a fundamental tool for the protection of individual rights and the construction of an effective European Area of Justice. Specifically in the domain of this Regulation, it asked the Commission the establishment of '*special common procedural rules (...) on uncontested claims*'.

This direction was also pointed out by the Council program of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted on 30 November 2000.

The EEO has a pioneer character since it was the first global and consistent product of the effort of solidifying the idea of suppression of the *exequatur*, brought by the Council Regulation (EC) No 2201/2003 in the localized domains of rights of access and return of the child.

## 7.2 Objectives

The main objectives of the EEO are:

- a) To contribute to the progressive abolition of the *exequatur*, thus suppressing the 'intermediate proceedings' needed 'to be brought in the Member State of enforcement prior to recognition and enforcement', – Article 1;
- b) To accelerate and simplify the enforcement of cross-border judgments, court settlements and authentic instruments on uncontested claims;
- c) To reduce the aggravated costs associated to the enforcement of foreign judicial and official documents.

## 7.3 Method

To reach these goals, the European Union legislator chose the 'Regulation' legal structure in order to avoid the need the delays and asymmetries that could emerge from a transposition process.

It was built over a concept of minimum standards which are imposed in order to grant the general acceptance of essential and indispensable requisites. The disrespect of such patterns determines the impossibility of using the mechanisms of the Regulation.

The pressure in the direction of the adaptation of the internal law to such minimum standards can also lead to the levelling and unification of the national proceedings.

The use of the EEO is not mandatory. For this reason, the creditor still can use the system of recognition and enforcement of the Regulation (EC) No 44/2001 or other Community Law instruments.

The EEO Regulation created a system of certification of internal decisions and documents that can circulate as enforcement orders all over Europe without any need of obtaining a previous declaration of enforceability in the State of the enforcement.

The enforceable document is produced in the Member State A – upon application at any time to the court of origin – certificated there as EEO by the competent authority and, after it, freely enforced, without the need of *exequatur*, in the EU States B, C, D..., under their internal procedural rules.

## **7.4 Geographical incidence**

Like with the former one, Denmark has not taken part in the adoption of this legal text and, consequently, is not bound by it or subject to its application.

## **7.5 Entry into force**

The Regulation is applicable since the 21 October 2005 – Article 33 and, in Romania and Bulgaria since 01.01.2007.

## **7.6 Scope**

The Regulation (EC) No 805/2004 is only applicable in civil and commercial matters.

This notion has no relation with the nature of the court or tribunal and corresponds to an autonomous European law meaning. It has been progressively build up by the case-law of the Court of Justice of the European Union, namely by the above indicated.

Revenue, 'customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ('acta iure imperii)', 'the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession', 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings', 'social security' and 'arbitration' are excluded from the bounds of the EEO Regulation – Article 2(1) and (2).

## **7.7 Claims**

Only a 'specific sum of money that has fallen due' can be claimed under the Regulation – see Article 4(2).

There are no limits to the dimension of the claims that can be at the origin of the EEO.

Just uncontested claims can generate an EEO.

A claim is uncontested, for the purposes of the Regulation, when:

- a) there is an express agreement to the credit by admission or by settlement approved by a court or concluded before it in the course of the proceedings – Article 3(1)(a);
- b) the debtor has never objected to it, 'in compliance with the relevant procedural requirements under the law of the



Member State of origin, in the course of the court proceedings' – Article 3(1)(b);

- c) 'the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings' – Article 3(1)(c); or
- d) the debtor has expressly agreed to it in an authentic instrument – Article 3(1)(d).

## **7.8 Court decisions and documents that can be certified as EEO**

Can be certified as EEO:

- a) Judgements – Articles 12 to 23;
- b) Decisions delivered following challenges to judgements (that don't raised objections to the existence of the credit) – Articles 12 to 23 and, especially, 12(2);
- c) Court settlements – Article 24;
- d) Authentic instruments – Article 25.

As previously said, only court decisions and documents with incidence on uncontested claims can be enforceable under the Regulation.

## **7.9 Forms**

Also in this Regulation, the need to surpass the linguistic barriers, to generate similar and easier interventions and quickness, imposed the adoption of several forms.

## **7.10 Information communicated by the Member States**

To have a full notion of the regime of the EEO, it is fundamental to consult the information communicated by the Member States on procedures for rectification and withdrawal, procedures for review, accepted languages and authorities designated for the purpose of certifying authentic instruments.

This information and other elements fundamental for the use of the Regulation can be reached in the *Internet* on the site of the 'European Judicial Atlas in Civil Matters' – in

## **7.11 Judgments and Decisions Delivered Following Challenges to Judgments. Judgements enforceable as EEO**

Are enforceable as EEO the judgements:

- a) On uncontested claims;
- b) Delivered in a Member State;
- c) Enforceable in the Member State where it was delivered;
- d) Not conflicting with the «rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001 – Article 6(1)(b);
- e) Generated by court proceedings that meet the minimum standards required by the Regulation;
- f) Given in the Member State of the debtor's domicile [this demand functions only if the decision has incidence on 'a contract concluded by' a 'consumer, for a purpose which can

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<sup>21</sup> Based on the art. 30 from the Regulation (EC) no. 805/2004, Romania communicated the following information related to the art. 10 para 2, art. 19, art. 20 and art. 25. Application for rectification of a certificate comes under the jurisdiction of the court which issued the certificate. That court decides on the application without summoning the parties. The decision to admit the application cannot be appealed against. The certificate is issued to the creditor and a copy sent to the debtor. An appeal may be lodged against the decision on the application for rectification within 5 days of the handing down of the decision for the creditor if present and within 5 days of notification for the creditor if absent (Article 6 corroborates Article 3 of Article 11 of Law No 191/2007 approving Emergency Government Ordinance No 119/2006 on measures necessary to implement certain Community regulations from the date of Romania's accession to the European Union). An application for withdrawal of the certificate must be lodged with the court that issued the certificate within one month of notification thereof. If, after the parties have been summoned, the court finds that the certificate was not issued in accordance with the conditions set out in Regulation No 805/2004, it must reverse the measures taken to issue the certificate and order the total or partial withdrawal of the certificate. An appeal may be lodged against the decision within 5 days of notification (Article 7 corroborates Article 3 of Article 11 of Law No 191/2007 approving Emergency Government Ordinance No 119/2006 on measures necessary to implement certain Community regulations from the date of the accession of Romania to the European Union). Under Romanian legislation, the procedures for review referred to in Article 19(1) are the ordinary and extraordinary review procedures. The accepted language is Romanian. If the enforcement order is an authentic instrument, certification is the competence of the court in whose district the instrument is issued (Article 2(2) of Article 11 of Law No 191/2007 approving Emergency Government Ordinance No 119/2006 on measures necessary to implement certain Community regulations from the date of the accession of Romania to the European Union).

be regarded as being outside his trade or profession' and the debtor is the referred consumer – Article 6(2) (d)].

### **7.12 Minimum standards**

The imposition of these standards aims to assure the full respect for the rights of defence of the debtor and that the claim is really uncontested, seeking to ensure the effective transmission of knowledge and the real understanding of the procedural message, especially about the steps necessary to contest the claim, allowing the complete use of the time delays available for the exercise of rights.

The control for the observance of these demands is made by the authority competent for the certification as EEO of the State where the judgement was delivered. There is no scrutiny of these demands in the Member State in which enforcement is sought.

The mentioned standards require that the service of documents is made with proof of receipt by the debtor – Article 13 – or without proof of receipt by the debtor but in conditions to allow the presumption that he had effective access to the documents served and to the information communicated – Article 14 – or on the debtor's representative – Article 15.

### **7.13 Cure of non-compliance with minimum standards**

When the rules contained in Articles 13 to 17 are not respected, there is still a chance of issuing an EEO if this non-compliance is cured through the mechanisms referred in Article 18. The cure stands on the secure knowledge that the defendant had, at least, the judgement served on him and that he had total conditions to challenge it, or that he personally received the document to be served in sufficient time to arrange for his defence.

### **7.14 Minimum standards for review in exceptional cases**

The Member State in which the judicial decision has been given can only certify a judgement as European Enforcement Order if there are, in its internal law, rules that allow the debtor to apply for a review, in the conditions referred in Article 19.

## **7.15 Enforcement procedure**

Due to the complete suppression of the *exequatur*, a judgement certified as EEO is enforced 'under the same conditions as a judgement handed down in the Member State of enforcement' – Article 20(1).

The enforcement procedures are 'governed by the law of the Member State of enforcement' – *ibidem* – except in the small area directly covered by the Regulation.

In the enforcement procedure, no security, bond or deposit can be required of a party on the ground 'that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement' – see paragraph 3.

### **7.15.1 Refusal of enforcement**

The enforcement of the EEO can only be refused by the competent court in the Member State of enforcement if the judgement certified is 'irreconcilable with an earlier' judgement 'given in any Member State or in a third country', under the conditions indicated in Article 21.

### **7.15.2 Stay or limitation of enforcement**

Only where the debtor has challenged a judgement certified as EEO (here included the application for review) or applied for the rectification or withdrawal of it, the competent court or authority in the Member State of enforcement may limit the enforcement proceedings to protective measures, make enforcement conditional or stay the referred enforcement proceedings (in this case, exclusively under exceptional circumstances) – Article 23. In these situations, a certificate indicating the lack or limitation of enforceability shall be issued (upon application, at any time, to the court of origin).

## **7.16 Court Settlements and Authentic Instruments**

The referred rules are applicable, as possible – see Articles 24(3) and 25(3) –, to the settlements concerning a claim 'approved by a court or concluded before a court in the course of proceedings and (...) enforceable in the Member State in which it was approved or concluded' – Article 24 – and to the authentic instruments – Article

25. The minimum standards are not demanded in relation to it, since the debtor has direct intervention in its formation.

### 7.17 Cases

G..., an enterprise with its seat in Bucharest, sold truffles to J..., a Spanish citizen, having delivered such product in Barcelona, his place of residence. J... left unpaid the amount of 4000 euros. G... lodged a proceeding in the Barcelona court asking such amount and interests. J... has not presented any opposition and the court issued a judicial decision imposing the payment requested plus 550 Euros of interests. During the proceeding, the service on J... was done through deposit of the document at a post office accompanied by the placing in J...'s mailbox of a written notification of that deposit. In face of that judgement, the Romanian enterprise asked, in such court, the issuing of an European Enforcement Order for uncontested claims. This court refused to issue the requested EEO with the argument that, after the judgement, the Spanish Supreme Court had declared that the pointed kind of service by deposit in the mailbox was unconstitutional.

Please comment this situation and find the adequate way to be followed by G...

Elements for the solution - Transmitted notion of minimum standards and Articles 1, 2, 4 and 14(1)(d) of the Regulation.

An enterprise from Argentina, M..., sold meat to an enterprise with its seat in Bucharest – L... – and delivered it in this city. The price, with the amount of 200.000 Euros, was never paid. M... obtained a favourable judgement in the Bucharest court. In the proceeding, L... never appeared. After the judgement, the Romanian enterprise changed its seat and assets to London, United Kingdom, so the Argentinian enterprise went to the Bucharest Court and

asked the issuing of an EEO, which was granted.

With such a document in hand face of this fact, M... lodged a request for the enforcement of the referred order. The UK' authority with competence for the enforcement refused it saying that the document was not enforceable since M... had not a seat in the European Union and corresponded to a judgement that could never be issued in the UK in the absence of the defendant since, attending to the value of the request, it's national system imposed a stronger control of the rights of defence. Besides, the amount contemplated in the decision surpassed the goals of the Regulation No 805/2004 that was intended to just cover small uncontested claims.

Please comment this situation and find solutions to it.

*Elements for the solution* - Articles 1, 2, 4, 6, 20 and 21.

The French Insurer K ... brought to a French court C... a Belgian citizen with domicile in Brussels, Belgium, asking the payment of 2500 Euros owed by this citizen in the context of an insurance contract celebrated by both. The insured presented an opposition only declaring that the French court had no jurisdiction and stating that it was the Belgian court of his area of domicile the competent for judging the referred application. The court repealed this defence and imposed C... the payment of such amount.

C... appealed from this decision that was confirmed by the French court of appeal. K... asked before the French court of first instance the issuing of an EOP but it refused his request on the grounds the Regulation No 805/2004 is only applicable to uncontested claims and the defendant opposed to the application and also referred that the decision was not his but from the appeal court. K... wants to appeal from the decision that denied the issuing of the EOP. Please comment this situation and find solutions to it.

Elements for the solution - Articles 1, 2, 3(1)(c) and (2), 4, 6(1)(b) and 10(4) of Regulation No 805/2004 and Article 12(1) of Regulation *RBI*.

## **8. Regulation (EC) no 1896/2006 of the European parliament and of the council of 12 December 2006 creating a European order for payment procedure**

### **8.1 Introduction**

The European order for payment procedure (EOPP) was introduced in the European Union Law system through the REGULATION (EC) No 1896/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006.

Its main goals were to fight the strong delays and non-proportional costs of litigation usually emerging in cross-border cases concerning uncontested pecuniary claims – Article 1(1)(a) – and to continue on the path initiated by the 'Regulation Brussels II bis' oriented to the complete suppression of the *exequatur*, thus aiming to give easier access to justice and to build an European Common Space of Justice, a union of freedom, security and justice based on mutual trust and permanent cooperation between courts and on the free movement of judicial decisions. It represents an answer to the defy of simplifying the legal instruments and cheapening the procedures needed to collect debts, removing the existing obstacles.

Behind it there was a strong economical motivation since the European legislator aimed to protect the small and medium-sized enterprises and the jobs associated to it from the corrosive effects of the late payments and to correct the distortion of competition within the internal market 'due to imbalances in the functioning of procedural means afforded to creditors in different Member States' – see Recital (8).

It was also aimed to give a cross border dimension to the internal mechanisms of mass debt collection, enlarging to the space of the Union the order for payment procedures known and used by the most part of the Member-States. It represented a direct materialization of the Presidency Conclusions of the Tampere European Council 15 and 16 October 1999 where it pointed out that 'Better compatibility and more convergence between the legal systems of Member States must be achieved'.

Among those conclusions there was also the invitation from the European Council to the Council and the Commission 'to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-



operation and to enhanced access to law, e.g. (...) orders for money payment'.

The regulation structure is developed based on a model that abstracts from monetary limits and eliminates the need of proof, focusing its axis in the absence of effective opposition from the alleged debtor.

It is this debtor that, through its procedural conduct confirms the debt, thus generating the order, or rejects it, maintaining the uncertainty as to its existence. In this situation, such existence of the claimed credit stills needs further judicial clarification.

The choice of such specific procedure is based on the conviction or prognosis of the creditor that the debtor, given the specific circumstances of the debt, will not oppose to it.

Here there is, somehow, an inversion of the burden of proof or, at least, a shift of the centre of the judicial debate on the debt.

## **8.2 Scope**

The object of this Regulation is civil and commercial matters.

As it happened with the previously analysed Regulations, this corresponds to a private notion of Community Law. The Case-Law already indicated is, here, totally valid.

It's not a permanent and unchangeable notion. Its limits must be reached having in mind the specific goals and objectives of Article 81 of the TFEU.

Are excluded from its incidence revenue, customs or administrative matters and the liability of the State for acts and omissions in the exercise of State authority – 'acta iure imperii'.

Also it is not applicable in the situations referred in Article 2(2).

## **8.3 Types of credits**

The EOPP is applicable to the collection of:

- a) Debts;
- b) That are pending, that is, remain due;
- c) Over which no legal controversy exists.

Can only be collected under the rules of the EOPP the claims arising from contractual obligations, except in the situations referred to in Article 2(2)(d) – debts subject of an agreement between the parties or related to liquidated debts arising from joint ownership of property.

About the notion of relevant credits for the purposes of the Regulation, it was asked in the preliminary ruling from the Sad Okregowy we Wrocławiu (Poland) lodged on 9 May 2011 – Iwona Szyrocka v SIGER Technologie GmbH – Case C-215/11 – if Article 4 of Regulation No 1896/2006 is to be interpreted 'as meaning that the features of a pecuniary claim that are referred to in that provision, that is to say the fact that it is of a specific amount and has fallen due at the time when the application for a European order for payment is submitted, relate only to the principal claim or also to the claim for default interest. More, it was asked if 'On a correct interpretation of Article 7(2)(c) of Regulation No 1896/2006, where the law of a Member State does not provide for the automatic addition of interest is it possible, in a European order for payment procedure, to demand in addition to the principal claim:

- a) All interest, including that known as 'open interest' (calculated from the day on which it falls due expressed as a specific date to a day of payment not specified by date, for example, 'from 20 March 2011 to the day of payment');
- b) Only interest calculated from the day on which it falls due expressed as a specific date to the day on which the application is submitted or the order for payment is issued;
- c) Only interest calculated from the day on which it falls due expressed as a specific date to the day on which the application is submitted?'

Complementarily, it was asked:

1. If the open interests can be indicated, 'how must the court's decision on interest be formulated in the order for payment form?';
2. If the interests can only be asked from a specific date of the issuing of the order for payment till the day of the submission of the initial application of the procedure, 'who must indicate the amount of interest: the party concerned or the court of its own motion?'
3. If only interest calculated from the day on which it falls due expressed as a specific date to the day on which the application is submitted, does the party concerned have an obligation to indicate the amount of calculated interest in the application?

Finally, in such preliminary ruling it was asked if 'the claimant does not calculate the interest claimed up until the day on which the application is submitted, must the court calculate that amount of its own motion, or must it then request the party concerned to complete the application pursuant to Article 9 of Regulation No 1896/2006'?

### **8.3.1 Characteristics**

What emerges from the Regulation, in this domain, is that such credits need to be:

- a) Of pecuniary nature – that is, express in current money in the State of origin;
- b) Liquidated – that is, for a specific amount;
- c) Due – that is, that have fallen due.

These characteristics should materialise 'at the time when the application for a European order for payment is submitted' – see Article 4.

### **8.3.2 Absence of limits**

It deserves to be underlined the fact of the European legislator has not defined any quantitative limitation to the claims susceptible of being presented under the Regulation, which makes it more useful and all-embracing in face of the limited area of the small claims – or low density proceedings.

### **8.3.3 Opposition**

The proceeding is centred around the idea of opposition.

If it exists, an ulterior procedure can be expected. If not, the European Enforcement Order Procedure fully functions, which leads to the subsequent formation of an enforcement order.

### **8.3.4 Exemption of proof**

There is no need for presenting any proof of the alleged facts, without prejudice of the functioning of Article 7(2)(e) which imposes to the applicant the obligation of presenting a description of the evidence supporting the claim. This seems to be pointed out more to the focusing of the procedural intervention than to any kind of control or evaluation.

### **8.4.1 Geographical application**

The EOPP is applicable in all the European Union Countries, exception made to Denmark.

### **8.4.2 Application in time**

The Regulation entered into force in the 12 December 2008 – see Article 33.

## **8.5 Jurisdiction**

### ***Rules***

When applying the EOPP, we must use the criteria for the definition of jurisdiction that come from the *Brussels I* Regulation.

Nevertheless, Article 6(2) contains a special rule in the domain of the claims related to 'a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer', assigning jurisdiction to the court of the domicile of the defendant – with the sense defined in Article 59 of the referred Brussels I Regulation.

Considering the use of the expression 'in particular', in Article 6(1), other rules on jurisdiction contained in different relevant Community Law precepts can also be applied.

In this domain, it is fundamental the Article 5 of RBI, that, in matters relating to a contract, gives jurisdiction to the courts for the place of performance of the obligation in question, since it is the privileged source of the claims collectable under the EOPP.

This Regulation contains, in Annex I(3), under the denomination 'Grounds for the court's jurisdiction', a set of elements oriented to give some guidance in the field of the choice of court .

## **8.6 Applicable law**

To the procedural matters that lead to the issuing of an enforceable order are applicable the norms of the Regulation and, in the areas not contemplated in such rules, the internal law of the Member State of origin.

As to the enforcement of the order, rules the the law of the Member State of enforcement – Article 21.

## **8.7 Methodology – the minimum standards**

### ***System adopted***

To reach its objectives, the EOPP followed the methodology of the Regulation (CE) no 805/2004 consecrating a system of minimum standards oriented to surpass the differences between the Member States' rules, particularly in the domain of the service of documents – see Recital (19).

In this field, the elevation of the standards on the service of documents to a level that could grant the indispensable contact with the defendant has determined the prohibition of the use of any method based on legal fiction.

Under this context, a Court serves the content of the European order for payment using its own domestic civil proceeding rules, with the limits that come from the minimum standards, that is, the norms regarding the guarantee of the exercise of the rights of defence and of a fair trial, contemplated in Article 13, 14 and 15.

In this domain, the referred preliminary ruling – Case C-215/11 – touched the core of this matter asking if the Regulation under analysis should be interpreted as: '(a) governing exhaustively all the requirements which must be met by an application for a European order for payment, or (b) determining only the minimum requirements for such an application and requiring that the provisions of national law be applied to the formal requirements for an application in the case of matters not governed by that provision' and if this last question is answered in the affirmative if 'where the application does not meet the formal requirements laid down in the law of the Member State (for example, the copy of the application intended for the opposing party has not been attached or the value of the subject-matter of the dispute is not specified), must a request for the claimant to complete the application be made pursuant to provisions of national law, in accordance with Article 26 of Regulation No 1896/2006, or pursuant to Article 9 thereof'.

Through such rules it is possible to obtain a level of absolute certainty – see Art 13 – or of strong probability – Article 14 – about the transmission of the procedural data to the defendant, not only on the existence of the procedure but also on the content of the applications and other procedural acts, on time and material conditions of the presentation of an opposition and on the meaning

and procedural consequences of the ulterior interventions and omissions.

The service of documents without proof of receipt by the defendant is only relevant and performed where there are conditions to presume the contact of the defendant with the knowledge that is intended to be transmitted.

### **Article 13**

Article 13 contains a set of rules that safely lead to a secure knowledge about the execution of the service of documents, since it stand on the existence of a personal service, a postal service attested by an acknowledgement of receipt or a service by electronic means attested the same way.

The use of the expression '*such as*' in paragraph (d) makes us conclude that other technological means of communication, present or future can be used.

### **Article 14**

The Article 14 has incidence on acts practised without proof of receipt by the defendant.

Here, the necessary security on the contact and transmission of contents to the defendant is obtained through the service on a different person, a mailbox, a post office, competent public authorities, postal service or electronic means attested by an automatic confirmation of delivery in specific conditions that can grant the service on the final addressee.

In the area of the new technologies, the validity of the service of documents depends on the existence of: (a) a system of automatic confirmation of delivery and (b) the previous acceptance of this method.

### **Article 15**

The minimum standards of Article 15 have incidence on service on a representative, allowing it.

This Article contains a remission to Articles 13 or 14. Here, the substantial difference is that the immediate addressee of the service is the defendant's representative.

### **8.7.1 Nonexclusive character**

The legislator has not decided to replace or to harmonise the existing mechanisms.

So, the claimant can use the EOPP or other existing proceedings for the recovery of uncontested claims under his internal law or the Community Law. The described procedure serves 'as an additional and optional means for the claimant, who remains free to resort to a procedure provided for by national law' – Recital (10).

Anyway, it can be expected that the minimum standards produce uniformity and convergence of legal systems – Art 1(2).

### **8.7.2 Strict cross border character**

The EOPP shall apply only in cross-border cases.

To reach this notion was used the concept of domicile.

The case has cross-border character for the effects of the Regulation where 'at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seized' – Article 3(1).

To reach such concept are applicable Articles 59 and 60 of RBI that send to the internal law of the court.

Such definition is made by reference to the time 'when the application for a European order for payment is submitted in accordance with this Regulation' – Article 3(3), being irrelevant the ulterior changes.

## **8.8 Functioning**

The EOPP functions between two poles: the Member State of origin – is situated the court that issues the European order for payment - and the Member State of enforcement – i.e., the Member State in which the enforcement of a European order for payment is aimed - see Article 5.

## **8.9 Procedure**

### ***Initial application***

The procedure for the issuing of an European order for payment is initiated through the submission of an application by the creditor using, for such effect, the form 'A' of annex I.

There, he must insert the elements indicated in Article 7. The applicant must, in this context, make a description of the evidence supporting the claim.

Since, according with Article 17, the proceeding shall continue before the competent courts of the Member State of origin if a statement of opposition is entered within thirty days – except if the claimant has explicitly requested - in the specific space of the form, that is, in appendix 2 of Annex I – that the proceedings be terminated in that event.

By coherence with the will of using the new technologies in order to facilitate the European Judicial Cooperation in Civil and Commercial Matters – showed, by example, by the Regulation (EC) no. 1206/2001-- the legislator admitted the use of different means besides paper to contain the application and allow its sending. Also electronic means are allowed if accepted by the Member State of origin and available to the court.

If such means are used, the signature must be made under the demands of Article 7(6) and it can even be exempted if 'an alternative electronic communications system exists in the courts of the Member State of origin which is available to a certain group of pre-registered authenticated users'.

### ***The mere description of the evidence supporting the claim***

According with Article 7(3), 'In the application, the claimant shall declare that the information provided is true to the best of his knowledge and belief and shall acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the Member State of origin'.

This lightness, that appeals to ethics and individual responsibility, can be also found on the defendants' side since this party, in its statement of opposition, contests the claim, 'without having to specify the reasons for this' - see Article 16(2).

The non-existence of documents to deal with facilitates the use of automatic document proceeding aimed in the Regulation – see Recital (11).

### ***Absence of the effect of 'res judicata'***

Since we are in face of a pre-judicial procedure – and, in some cases, a proceeding of non-judicial nature – nothing that can occur



in case of frustration of the applicant's claim has the potentiality of closing the possibility of further application in the context of a declarative action. This includes the situation where the defendant issued a previous declaration of opposition to the transfer to ordinary civil proceedings. It is so namely because there isn't, here, any judicial decision confirming such manifestation of will. This also seems to results from the second part of Article 17(1).

Different can be the situation where the creditor, already owing an enforcement order, initiates a declarative proceeding on the same subject. In this situation we could see a lack of interest in acting.

### ***The cause of the action***

Article 7(2)(d) requires that the application contain the indication of the cause of the action.

According to it, the applicant shall 'include a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded'.

The authority responsible for the evaluation of such application cannot be very demanding when performing such task, since there is not mandatory 'the representation by a lawyer or another legal professional' - see Article 24. So, it should only demand the minimum clarity that could allow the understanding of the grounds for jurisdiction and that the defendant can understand the origin and characteristics of the claim.

### ***The claims***

By virtue of Article 7(2)(b), the claimable pecuniary credits referred to a specific amount that have fallen due at the time of the presentation of the application include the principal credit, interests also already fallen due – not future, since the Regulation requires the indication of a concrete amount –, contractual penalties and costs.

### ***Elements to send***

In order to allow the adequate formation of the European order for payment it is essential that the alleged debtor can have access to the whole content of the claim. That is why Article 12(2) states:

'The European order for payment shall be issued together with a copy of the application form.'

Nevertheless, not all data need to be given. Are excluded the information given by the claimant in Appendixes 1 and 2 of form 'A' – Bank details and opposition to a transfer to ordinary civil proceedings. This is completely comprehensible, in one case considering the lack of need of the information and the protection of privacy and, in the other, the importance of granting efficacy. Where, in Article 12(4)(c) it is said that 'the defendant shall be informed that' 'where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure'<sup>22</sup> unless the claimant has explicitly requested that the

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<sup>22</sup> In the Title IX The Payment order procedure (art. 999 – art. 1010) from the civil procedure code (Law no. 134/2010), the **payment order procedure** applies to certain, liquid and exigible claims consisting in payment obligations of some amounts of money resulting from a civil contract, ascertained by a document. There are not included in the scope of this procedure the claims registered at the statement of affairs within an insolvency procedure.

The creditor will serve the debtor, through bailiff or registered letter, with declared content and acknowledgment of receipt, a summoning informing this one to pay the amount owed within 15 days from its reception. This summoning interrupts the extinctive prescription. If the debtor does not pay the creditor in due time may lodge the payment order application at the court competent for judging the case substance in first instance.

The payment order application will contain the creditor and debtor coordinates; the amount representing the object of the claim, the basis in facts and law of the payment obligation, the period to which they refer and the payment time limit; the amount representing the afferent interests or other compensations; the creditor signature. At the application are attached the documents attesting the owed amount. The summoning proof of service will be attached to the application under the sanction of its rejection as inadmissible. The application and documents enclosed to this one are lodged in as many copies as much parties are, plus one for the court.

If the parties did not establish the interest level for the delayed payment, there will apply the reference interest installment established by the National Bank of Romania. The reference installment in force on the first calendaristic day of the semester applies for the whole semester. The claim produces interests as it follows:

1. in the case of the contracts concluded between professionals, from the date on which the obligation became exigible;
2. in the case of the contracts concluded between professionals and a contracting authority, without needing to delay the debtor: if the contract established a payment time-limit, from the second day following this time-limit; if the payment time-limit is not established in the contract, after 30 days.
3. in all the other cases, from the date on which the debtor was or is delayed by right.

The creditor may pretend additional damages-interests for all the expenses made for the recovery of the amounts as a result of the non-execution in due time of the obligations by the debtor. Is hurt by absolute nullity the convention or clause fixing an obligation for delay in order to operate the interests flow or a time-limit from which the claim produces interests, superior to the one stipulated above.

In order to solve the application, the judge orders the parties' summoning, according to the provisions referring at the urgent causes. The summons will be served to the party 10 days before the trial. At the summons for the debtor there will be enclosed, in copy, the creditor's application and the documents lodged by this one for proving the claims. The

proceedings be terminated in that event' the objective is to transmit notion about the functioning of the proceeding and not a concrete notion about the position of the claimant on this matter.

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summons will specify that the debtor is obliged to lodge a defence at least 3 days before the trial, there being mentioned that, in the case the defence is not lodged, the court may consider this as a recognition of the creditor's claims. The defence is not served to the plaintiff, who will be informed about its content from the case file.

If the creditor declares he was paid the owed amount, the court takes act of this circumstance by a definitive conclusion, by which is ordered the file conclusion. When the creditor and debtor agree upon the payment, the court takes act of this one, pronouncing an expedient judgment. The expedient judgment is definitive and şi constitutes enforceable order.

If the debtor challenges the claim, the court verifies whether the challenge is well-founded and, if the debtor's defence is well-founded, the court will reject the creditor's application by conclusion. If the defences formulated by the debtor suppose taking other evidence, and this would be admissible, according to the law, in the common law procedure, the court will reject the creditor's application on the payment order by conclusion. The creditor may also lodge an application for suing at law according to common law.

If the court ascertains that the creditor's claims are well-founded, it will issue a payment order specifying the amount and payment time-limit. If the court, examining the case evidence, ascertains that only a part of the creditor's claims are well-founded, it will issue the payment order only for this part, also establishing the payment time-limit. In this case, the creditor may also formulate a request for suing at law according to the common law in order to obtain the debtor's obligation to pay the rest of the debt. The payment time-limit will not be inferior to 10 days and will not exceed 30 days from the order service date. The judge will not be able to establish a payment time-limit unless the parties agree to this effect. The order will be served to the parties present or will be served immediately to each party.

If the debtor does not challenge the claim by defence, the payment order will be issued within at most 45 days from the application lodging. The calculation of the time-limit does not contain the period needed for the service of the procedural documents and the delay caused by the creditor, inclusively as a result of the application amendment or completion.

Against the payment order the debtor can formulate a request for annulment within 10 days from its service date. The request for annulment may be lodged by the creditor against the conclusions, as well as the payment order within 10 days. By the request for annulment there can be invoked only the non-observance of the requirements stipulated for the issue of the payment order, as well as, if applicable, causes for the extinction of the obligation after the issue of the payment order. The request for annulment is solved by the court who pronounced the payment order, in panel composed of 2 judges and the execution is not suspended. The suspension will be agreed, at the request of the debtor, only by giving bail, whose quantum will be established by the court. If the invested court admits, totally or partially, the request for annulment, it will cancel the order, giving a definitive judgment. If the invested court admits the request for annulment, it will give a definitive judgment issuing the payment order. The judgment which rejected the request for annulment is definitive.

The payment order is enforceable, even if it is attacked with request for annulment and has provisional *res judicata* until the settlement of the request for annulment. The payment order becomes definitive as a result of the non-introduction or rejection of the request for annulment. Against the forced enforcement of the payment order the interested party can challenge the execution, according to common law. Within the challenge there can be invoked only irregularities concerning the enforcement procedure and causes for the extinction of the obligation occurred after the definitive remaining of the payment order.

### ***Examination of the application***

According with Article 8 of the EOPP, the application is subjected to a preliminary analysis by the court to which it is presented in order to control the fulfilment of the requisites demanded by Articles 2, 3, 4, 6 and 7.

According with the Romanian declarations to the Commission under Article 29, 'The court with jurisdiction to issue a European order for payment is the court with jurisdiction for hearing the case at the first instance (according to Article 2(1) of Government Ordinance No 5/2001 on the order for payment procedure, approved by Law No 295/2002). These are district courts and general courts'.

Such court shall evaluate 'whether the claim appears to be founded'. Opening the 'door' to mechanisms used by the Austrian and German systems, that inspired the Regulation, it is allowed the analysis of the application through automatic data processing mechanisms – as occurs with the 'elektronischen Mahnverfahren' of such systems.

According with Article 9, the court should give the claimant the opportunity to complete or rectify the application where the requirements set out in Article 7 are not met.

This opportunity is not given if the claim is clearly unfounded – v.g. where the facts indicated by the claimant don't point out the existence of any contractual obligation – or the application is inadmissible – for instance where there is no cross-border connection or the matter is not civil and commercial.

The court must specify a time limit for the completion or rectification. Such time limit can be extended at the discretion of the court.

There are no express criteria for the definition of this time limit. The only legal reference to this comes from the expression 'it shall specify a time limit it deems appropriate in the circumstances'.

Thus, the extension of this time delay is made through a discretionary manner – which is clearly referred in the last period of Article 9(2). Between the circumstances relevant for its definition we can find the geographical distance and the complexity of the means for obtaining some evidence.

### ***Partial admission and change of the claim***

If the requisites indicated in Article 8 are filled in relation to only a part of the claim, the court shall issue a European order for payment,

for that part of the claim, if that is accepted by the claimant – the issuing shall occur under the rules of Article 12.

In the proceeding for defining the new value of the claim, the court should hear the claimant. According with Article 10(1), 'The claimant shall be invited to accept or refuse a proposal for a European order for payment for the amount specified by the court'. For this, there is a special form in annex to the Regulation – form C of annex III. Whatever the circumstances might be, the claimant 'shall be informed of the consequences of his decision.

As to the part of the claim not contemplated and to the exercise of the connected procedural rights are applicable the internal laws of the Member State of the court that proposed the claim reduction.

The internal decision obtained as to that part is subject to recognition and enforcement according with the Regulation Brussels I.

'If the claimant fails to send his reply within the time limit specified by the court or refuses the court's proposal, the court shall reject the application for a European order for payment in its entirety' – Article 10(3).

### ***Rejection of the application***

The court can only reject the application if:

- a) It has not incidence on civil and commercial matters – under the sense given by Article 2(1);
- b) The question has no cross-border connection – Article 3;
- c) The claim don't refer to a credit for a specific amount that have fallen due at the time when the application for a European order for payment is submitted – Article 4;
- d) The court has no international jurisdiction under the rules of Article 6;
- e) The requisites demanded in Article 7 were not initially filled and the claimant has not completed or rectified the application in the time limit defined under Article 9(2);
- f) The claim is clearly unfounded;
- g) Facing a courts' proposal on a partial issuing of the enforcement order initially aimed, the applicant don't send his reply in the defined time or refuses such proposal – Article 10.

It is mandatory that the claimant might be informed of the grounds for the rejection of his application.

### ***No right of appeal against a rejection***

Article 11(2) contains a command that forbids the appeal against the rejection of the application. This corresponds to the materialisation of what is announced in Recital (17). According with such recital 'There is to be no right of appeal against the rejection of the application'. The claimant can also present a new application asking the issuing of a different EEO. This possibility lessens the effects of the rejection of the possibility of appealing.

This solution seems to have stood on the idea that we are in face of a pre-judicial and facultative procedure, which means that the grant of effective judicial protection is assured.

### ***Review***

To mitigate the effects of such rejection, the same recital ruled that 'This does not preclude, however, a possible review of the decision rejecting the application at the same level of jurisdiction in accordance with national law'.

The review procedure is regulated by the national internal law.

### ***Issue of a European order for payment***

If there are no grounds for rejection and solved the difficulties that, eventually, might have determined that the claimant have been given the opportunity to complete or rectify the application, the court must issue a European order for payment within 30 days of the lodging of the application. If this time period cannot be respected, that issue must occur '*as soon as possible*' – see Article 12 – making use of form 'E' of Annex V.

### ***Service of documents on the defendant***

In the procedure under analysis the defendant is advised that he can choose between:

- a) paying to the claimant the amount indicated in the order; or
- b) opposing the order by lodging with the court of origin a statement of opposition.

At the moment of the service of documents on him, he must receive the data indicated in Article 12(4), that is, information on the

unilateral character of the proceeding and the consequences of the lack of opposition, especially on the fact that 'the order will become enforceable unless a statement of opposition has been lodged with the court'.

Such service is made according with the Member State's internal rules, but the minimum standards referred to in Articles 13, 14 and 15 must be respected.

In order to allow the lodging of a statement of opposition, the defendant must receive, at the moment of the service, the form adequate for such effect, i.e. the form 'F' of annex VI.

### ***The lodging with the court of origin of a statement of opposition***

If the defendant opposes the order by lodging with the court of origin a statement of opposition in the time period defined by the Regulation – within 30 days of service of the order on him – the claim leaves the sphere of the EOPP and loses its European dimension – *'the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure'*; see Article 17(1).

This doesn't occur if the claimant has explicitly requested that the proceedings be terminated in the event of opposition.

Considering the objectives pursued by the European legislator in this area and the need to make an integrated and uniform interpretation of the EU Regulations in civil and commercial matters, we must conclude that the claimant can still use the Small Claims Regulation – Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure – if the credit is comprehended in the limits of such Regulation.

To lodge a valid opposition, the defendant is not required to specify the grounds of the challenge and may submit it electronically if this is accepted and available at the court of the Member State of origin.

It is mandatory that the claimant is 'informed whether the defendant has lodged a statement of opposition and of any transfer to ordinary civil proceedings' – Article 17(3).

### ***The enforceable order and the suppression of 'exequatur'***

In face of the lack of opposition, 'the court of origin shall without delay declare the European order for payment enforceable using standard form G. as set out in Annex VII' – see Article 18(1).

From that moment on, the European enforcement order – that is sent to the claimant according with Article 18(3) – circulates freely in the EU space as a decision enforceable in any Member State, without the need of 'exequatur' and 'without any possibility of opposing its recognition' – see Article 19.

This represents the core structure of the Regulation since, as we see in its Recital 9 'The purpose of this Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement'.

It is the law of the Member State of origin that defines the formal enforceability requisites.

### ***Review***

As allowed by Article 20 of the EOPP, there can still be an exceptional review after the expiry of the time limit of the opposition, on application of the defendant lodged in the court of origin if:

- a) The service was made without proof of receipt by him and was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part;
- b) He was prevented from objecting to the claim:
  1. by reason of force majeure;
  2. or due to extraordinary circumstances;
  3. without any fault on his part;
- c) The order for payment was clearly wrongly issued, that is, violating the requirements established by the Regulation;
- d) Other exceptional circumstances occur – these circumstances were not indicated by the legislator so they must be identified attending not only to its exceptional character but also to the existent parallelism with the



expressly indicated ones – by instance if the application contained false facts.

In the cases of review, the court with jurisdiction of the Member State of enforcement can, upon application by the defendant – see Article 23:

- a) Limit the enforcement proceedings to protective measures; or
- b) Make enforcement conditional; or
- c) Under exceptional circumstances, stay the enforcement proceedings.

If the application for review is upheld, the order is declared invalid; if this does not happen, it remains its enforceability.

### **8.10 Time limits**

The several Articles of the Regulation don't reproduce the content of Recital (28). Anyway, even considering that it can represent the product of an arguable legislative technique, we should accept the relevance of the expression of will there contained as an attempt to rule the matter of the time limits.

According with it 'For the purposes of calculating time limits, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (1) should apply. The defendant should be advised of this and should be informed that account will be taken of the public holidays of the Member State in which the court issuing the European order for payment is situated'.

The judicial holidays are not contained her.

#### **8.11.1 Enforcement**

According with Article 21(1), 'A European order for payment which has become enforceable shall be enforced under the same conditions as an enforceable decision issued in the Member State of enforcement'. It can be materialised in a copy of such order 'as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity', translated where necessary – Article 21(2). To start the enforcement proceeding based on an EOP, the applicant must present this copy.

The enforcement is made under the rules of Articles 21, 22 and 23 of the EOPP. In the domains not covered, are applicable the

internal procedural law of the Member State of the court with competence to perform the enforcement.

### **8.11.2 Refusal of enforcement**

The enforcement can only be refused by the competent court of the Member State of enforcement if, according with Article 22:

- a) The EOP is irreconcilable 'with an earlier decision or order previously given in any Member State or in a third country' that:
  1. 'involved the same cause of action between the same parties';
  2. 'fulfils the conditions necessary for its recognition in the Member State of enforcement'; and
  3. 'the irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin';
- b) The 'defendant has paid the claimant the amount awarded in the European order for payment'.

It must be allowed, in relation to the EOP, all the means of opposition granted in the internal law of the Member-State of enforcement in relation to the national orders for payment – see Article 21(1).

It is fundamental to bear in mind that the EOP can never '*be reviewed as to its substance in the Member State of enforcement*' – Article 22(3).

### **8.12 Forms**

As with other regulations in this area of cooperation, the set of precepts in question was accompanied by forms that aim to standardize, simplify, overcome language barriers and facilitate communications.

The importance of the forms in this dynamics was immediately foreseen in Recital 31 of the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999, that stated: 'Common minimum standards should be set for multilingual forms or documents to be used in cross Romanian border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union'.

We can count, among the advantages of the use of forms, the fact that it allow the parties to litigate by themselves, without the need of the intervention of a legal professional.

By other side, only the pre-formatted entry of data can enable the normalization of flows and the circulation *urbi et orbi* of the order, i.e., that similar applications can be submitted all over Europe and analysed under the same criteria, thus allowing an harmonised answer from the Justice system that, as declared, the EU wants to be common.

Considering the goals of the Regulation in the field of the use of informatics' means, the use of forms has, here, the complementary goal of allowing the digital and automatized treatment of the information, as occurs in the Austrian and German systems.

### **8.13 Legal representation**

It is not mandatory the representation by a lawyer or another legal professional nor for the claimant in respect of the application nor for the defendant in respect of the statement of opposition. This generates the need of a greater care with the granting procedural rights and the transmission of information by the court – see Article 24.

This legal rule has some positive aspects since it allows the levelling and dissemination of the EOPP and the cheapening of the costs of the collection of cross-border credits.

By other side, it deserves some critics since the technicality of some legal options – such as the choice of the court with jurisdiction – should, in principle, discourage the incursion in the proceeding of the isolated citizen.

Anyway, nothing forbids the representation by the referred legal professionals.

### **8.14 Court fees**

This proceeding involves the payment of court fees – which also include charges to be paid to the court. Such expenses are limited by the global amount of the 'court fees of ordinary civil proceedings without a preceding European order for payment procedure' in the Member State of the court with jurisdiction.

It results from No. (9) of the 'Guidelines for filling in the application form', annex to the Regulation, that the expression 'court fees'

corresponds, here, to an autonomous concept lacking direct connection with internal notions and even covering expenses previous to the lodging of the procedure.

### 8.15 Cases

An enterprise with seat in Los Angeles, California (X...) sold automatic selling machines to a Bulgarian enterprise I... with seat in Sofia and, as agreed, delivered those machines in several Bulgarian cities. For economic difficulties, I... has not paid the second and third parts of the price, that is, the global amount of 350.000 Euros. The lawyers of X... recommended the use of the Regulation No. 1896/2007 to collect the credit since they didn't expected any opposition from the defendant. The court of Sofia, rejected the application for an European order for payment procedure because it considered that such procedure was not applicable in this case considering that the place of the seat of X... was outside of the European Union. In face of this decision, X... lodged an appeal in the Bulgarian Judicial System sustaining that the decision of the first instance court had no support on the referred Regulation and that, after the presentation of the application, changed its seat to Sofia.

Please comment this case and find the correct legal solutions.

Elements for the solution - Articles 2, 3 (1),(2) and (3), 4, 5 and 6, 11(2) .

R..., a Romanian company rented 20 commercial vehicles to the enterprise ... with a branch in Berlin and statutory seat in Iași. Global amount of the renting was 14.800 Euros. This amount was never paid and the vehicles never returned. R... initiated an European order for payment procedure asking the payment of such amount added of the

amount of rents due till the day of the return of the vehicles. The Iași court issued an European order for payment using standard form E as set out in Annex V of the Regulation. After the expiry of the time limit laid down in Article 16(2), T... asked a review sustaining that this was not a cross-border case. Please find the rules applicable and the adequate legal framing of the facts.

Elements for the solution - Articles 11(1)(a), 3(1) and (2), 20, of the Regulation No 1896/2006 and Article 60(1) of the BI Regulation.

N..., a Danish citizen born in Copenhagen and with domicile in Wrocław, Poland, send by email to a the Bucharest court with jurisdiction for hearing the case at the first instance an EOPP application against S..., a Romanian citizen from Bucharest, from whom he just knew the first name and the address. This application was presented without the intervention of a lawyer. In such application, N... asked the payment of 25.000 Euros, only indicating that this amount referred to damages that he suffered in a car crash occurred in that city, in 30 December 2006, and for which he considered S... responsible. In the application, N... just indicated the name of three witnesses that watched the collision of the vehicles.

He also asked the payment of default interests counted since the 30 December 2006 till the date of the effective payment. He requests that the court appoint him a lawyer to represent his procedural interests in the next phases of the proceeding and in the eventual enforcement phase.

Please analyse this case as if you were the judge of the proceeding and refer the applicable rules and the correct solution to this case, pointing out what eventually might seem contrary to the European Law.

Elements for the solution - Recital (32), moment of adhesion of Romania to the EU, Articles 1, 2, 3, 4, 6, 7, 24 and 25,

manual with the declaration from Romania on the means of communications accepted under Article 29(1) (c).

## **9. Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and its links with the EC Regulations no. 44/2001, 805/2004 and 1896/2006**

### **9.1 Introduction**

*The Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)* contains the present legal rules on service of documents in the context of the judicial cooperation in civil and commercial matters in the EU space.

It replaced the referred Regulation (EC) No 1348/2000 due to several fragilities and limitations that this one has showed during its short 'life'.

It is an operational set of rules that must be applied whenever there is some need of transmission of contents of documents in the context of the judicial cooperation in civil and commercial matters in Europe, that is, whenever such transmission is needed in situations with a cross-border element.

So, it is the Regulation that should be used where such needs appear when applying the Regulations no. 44/2001, 805/2004 and 1896/2006.

### **9.2 Improvements**

In face of the former Regulation, the new one presents the following improvements:

1. The R. 1348/2000 did not contain a time limit for the transmission of an act. The new text changed this situation creating it – see its Recital 9 and Article 7(2);
2. The time periods were counted asymmetrically, in accordance with the national laws, which created difficulties of knowledge and interpretation of the rules and undermined the uniform application in a space wanted to be common. In the new Regulation the problem was solved by giving uniformity to the counting system, better access to the relevant rules and general and consistent application through a unique reference to the Regulation (EEC, Euratom) No

1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits;

3. The linguistic rules were clarified and improved, particularly those relating to the translation of acts and annexed documents, solving, in legal terms, problems already resolved by the European Court case law;
4. The existing wording of Article 11 on costs of service was improved as regards to the 'recourse to a judicial officer or to a person competent under the law of the Member State addressed' and to 'the use of a particular method of service';
5. The mechanisms of service by postal services were standardised in Article 14, and the registered letter with acknowledgement of receipt or equivalent was chosen as vehicle of the service;
6. It was established a more precise and obligatory system of double date of service in Article 9, since the application of the previous system was facultative and, according with the Commission opinion, also particularly complex;
7. It was facilitated the transmission, by electronic means and through digital distance access – specially by the mechanisms created by the European Judicial Network in Civil and Commercial Matters – of the manual containing a list of requesting and central authorities, as well as their geographical areas of jurisdiction and other elements of the communications transmitted by the States under Article 23, which didn't happen in the repealed Regulation.

### **9.3 Objectives**

It is objective of this Regulation, in the own words of the European legislator, to maintain and develop 'the Union as an area of freedom, security and justice, in which the free movement of persons is assured', namely through the adoption of 'measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market'. Thus, it is particularly of economical origin the motivation that underlies. The building of a common space of justice is, in this context, instrumental for the achievement of the economical finalities of the Union.



Under such conception, the matter of the service of documents couldn't be excluded, considering that it is a decisive element for the proceedings with a cross-border element.

Conscious of this importance, that legislator established the goals of making better the transmission of knowledge on the contents of judicial and extrajudicial documents between the European Union courts making that transmission more fluid, swifter and simpler.

#### **9.4 Object**

Its object is civil or commercial matters.

Are excluded from it revenue, customs or administrative matters and liability of the '*State for actions or omissions in the exercise of state authority (acta iure imperii)*' – Article 1(1).

The concept of civil and commercial matters is autonomous and evolutive, as occurred in relation to the previously analysed Regulations. The case-law referred about it is also relevant here.

The notion on its limits is obtained through the analysis of the objectives and goals defined by Article 81 of the *Treaty on the Functioning of the European Union*.

It rules not only the service of judicial documents but also of extrajudicial. About such concepts, we must have in mind that they are, too, autonomous and originated in the European law, so, the use of notions coming from the Member States' internal systems should be avoided – about the specific notion of extrajudicial documents, see the ECJ Case C-14/08 do TJUE, '*Roda Golf & Beach Resort, S.L.*'

According with such case, the judicial cooperation can appear outside of a judicial proceeding where: (a) it has cross-border connection; (b) the service can contribute to the better functioning of the internal market and (c) don't represent a excessive burden for the judicial authorities involved.

The Regulation is applicable whenever it is aimed '*the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States*' – Recital (2).

Since it is envisaged the real transmission of such documents and not the practice of merely formal acts, the Regulation is not applicable where the address of the '*person to be served with the document is not known*' – Article 1(2).

If there are several addresses, it should be chosen by who requests the service the one that grants the contact with the addressee.

For the same order of reasons, it seems to violate the spirit of the Regulation a rule that imposes to foreigners, for procedural effects, the indication of an address for the service of documents, in a Member State where they don't really live or have regular activity.

For obvious reasons, the Regulation is not applicable where it is not necessary – this happens, for instance where a corporation has an agency or representative with powers to receive service of documents in the Member State of the proceeding.

As to the intervention of representatives, it is asked in the preliminary ruling from the Sąd Rejonowy w Koszalinie (Republic of Poland), lodged on 28 June 2011 - Krystyna Alder and Ewald Alder v Sabina Orłowska and Czesław Orłowski – Case C-325/11 – if 'Article 1(1) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters 1 and Article 18 of the Treaty on the Functioning of the European Union' are 'to be interpreted as meaning that it is permissible to place in the case file, deeming them to have been effectively served, court documents which are addressed to a party whose place of residence or habitual abode is in another Member State, if that party has failed to appoint a representative who is authorised to accept service and is resident in the Member State in which the court proceedings are being conducted'.

## **9.5 Applicability**

The Regulation No. 1393/2007 is directly applicable in the Member-States, without the need for an internal acceptance and conversion procedure – Article 288 of TFUE.

As occurred with the Regulation No. 1348/2000, the application of the present Regulation was extended to Denmark – see the agreement of 19.10.2005, in OJ L 300/55, of 17.11.2005, and the OJ 94/70, of 4.4.2007.

## **9.6 Transmitting and receiving agencies**

Public officers, authorities or other persons designated by the Member-States can perform either the functions of 'transmitting

agencies', competent for the transmission of judicial or extra-judicial documents to be served in another Member State, and 'receiving agencies', competent for the receipt of judicial or extrajudicial documents from another Member State – Article 2(1) and (2). There can also be one single agency to perform both functions and a federal State, a State in which several legal systems apply or a State with autonomous territorial units shall can even designate more than one such agency – Article 2(3). Are contemplated, here, private or semi-private interventions as occurs with the French 'huissiers de justice'.

In Romania, the receiving agencies are the first instance courts, as declared by this Country to the Commission.

### **9.7 Central bodies**

In spite of having kept the institutional interventions of central bodies representative of the executive power, the Regulation has restricted its action to '(a) supplying information to the transmitting agencies; (b) seeking solutions to any difficulties which may arise during transmission of documents for service; (c) forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency' – Article 3.

Even if the rule in this matter is the appointment of one central body per Member State, a 'federal State, a State in which several legal systems apply or a State with autonomous territorial units' can 'designate more than one central body' – *ibidem*.

### **9.8 Channels**

The central bodies have a restricted action because the European legislator wanted to establish a system of direct and decentralised service of documents standing in a unique channel having, at one side, who asks the service and, at the other, who performs it. This results, clearly, from Articles 4 to 11 and 16.

Through this architecture it was aimed to produce effectiveness and quickness, being obvious the higher potentialities of a non-intermediated mechanism of judicial cooperation.

This strategy can be found in several other Regulations of this area – see, for example, the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

In order to facilitate the operation of direct channels, it was created a comprehensive manual that can be found in its Romanian version in the European Judicial Atlas in Civil Matters. This manual contains the identification of the various agencies and the communications of the Member States sent in order to make easier the practical application of the Regulation.

### **9.8.1 Transmission by consular or diplomatic channels**

In spite of been preferred, the direct judicial cooperation is not the only means accepted by the legal text under analysis. According with Articles 12 and 13, in exceptional circumstances, a Member State can use consular or diplomatic channels to forward judicial documents, for the purpose of service, to the agencies of another Member State and effect service of judicial documents on persons residing in another Member State, without application of any compulsion, directly through its diplomatic or consular agents.

This also occurs without prejudice of the fact that, has happened with France, any 'Member State may make it known, in accordance with Article 23(1), that it is opposed to such service within its territory, unless the documents are to be served on nationals of the Member State in which the documents originate'.

### **9.8.2 Service by postal services**

It is also allowed that each Member State can 'effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent' – Article 14.

### **9.8.3 Direct service**

Finally, Article 15 establishes that 'any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State'.

The legislator called this as 'direct service'.

## **9.8.4 Relationship between channels for the performance of the service**

As to the relationship between the several channels for the performance of the service and to the possibility of its cumulating, it must be considered what was decided the ECJ Case C-473/04, 09.02.2006, Plumex v Young Sports NV. In this case, the Court stated that the Council Regulation (EC) No 1348/2000 of 29 May 2000 'does not establish any hierarchy between the method of transmission and service under Articles 4 to 11 thereof and that under Article 14 thereof and, consequently, it is possible to serve a judicial document by one or other or both of those methods'. This is applicable to the new Regulation, since its structure and rules have not changed in this domain.

This decision of from the Court of Justice of the European Union also showed that 'where transmission and service are effected by both the method under Articles 4 to 11 thereof and the method under Article 14 thereof, in order to determine vis-à-vis the person on whom service is effected the point from which time starts to run for the purposes of a procedural time-limit linked to effecting service, reference must be made to the date of the first service validly effected'.

### **9.9.1 Forms**

As it happens with several other Regulations on civil and commercial matters, the legal text here referred makes use of forms. Such forms are annex to the Regulation through it is aimed to produce uniformity, swiftness, simplification and to surpass linguistic barriers. The form that contains the request 'shall be completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept' – Article 4(3).

### **9.9.2 Formalities**

Article 4(4) establishes that the 'documents and all papers that are transmitted shall be exempted from legalisation or any equivalent formality'. This exemption doesn't cover the need for translation. This linguistic conversion needs to be made in 'a language which the

addressee understands' or 'the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected' – Article 8(1)(a) and (b).

### **9.10 Translation of documents**

In this point, it must be considered what emerges from the ECJ Case C-14/07 of 08.05.2008, 'Ingenieurbüro Michael Weiss und Partner GbR v Industrie und Handelskammer Berlin', in the following interpretative direction: 'the fact that the addressee of a document served has agreed in a contract concluded with the applicant in the course of his business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language, but is evidence which the court may take into account in determining whether that addressee understands the language of the Member State of transmission in such a way as to enable him to assert such rights'.

According with the same decision, are different the requirements, according with the nature of the document to serve, that is, the demands are different if the 'documents enable the defendant to understand the subject-matter and grounds of the plaintiff's application and to be aware of the existence of legal proceedings in which he may assert his rights' or 'have a purely evidential function, distinct from the purpose of service itself'.

It emerges from this case that 'is for the national court to determine whether the content of the document instituting the proceedings is sufficient to enable the defendant to assert his rights or whether it is necessary for the party instituting the proceedings to remedy the fact that a necessary annex has not been translated'.

If the annexes are referred to contractual correspondence defined in the contract as admitted in the language of the Member State of origin, the addressee of a service of documents that started a proceeding could not, anyway, invoke the provision of Article 8(1) of the former Regulation to refuse the reception of such annexes.

The Regulation don't impose to applicant the translation of the act to be served but he shall 'be advised by the transmitting agency to which he forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided

for in Article 8', that is, a language which the addressee understands or an official language – Article 5(1).

The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs – Article 5(2).

If the refusal from the addressee occurs, based on the language inadequacy, the receiving agency 'shall immediately inform the transmitting agency (...) and return the request and the documents of which a translation is requested' – Article 8(2).

In such a context, the applicant must provide the translation needed in order to make viable the service – Article 8(2) and (3).

It is relevant, in this domain, the content of the decision of the ECJ Case C-443/03, of 08.11.2005, *Götz Leffler v Berlin Chemie AG*, from which deserves reference the following extract: 'when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, it is possible for the sender to remedy that by sending the translation requested' and on 'when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, that situation may be remedied by sending the translation of the document in accordance with the procedure laid down by Regulation No 1348/2000 and as soon as possible'.

This case underlined the importance of the control – by the national judge, in situations of lack of appearance of the defendant – of the effective sending of a translation in time to allow the presentation of an opposition.

The way to overpass a situation of lack of the translation needed is ruled, in the part not dealt by the Regulation, by the national procedural law. On this point, the indicated *Leffler* case defined that in 'it is incumbent on the national court to apply national procedural law while taking care to ensure the full effectiveness of that regulation, in compliance with its objective'.

### **9.11.1 Date of service**

The question of the definition of the valid date of the service, in cases characterized by the lack of initial translation, is solved in Article 8(3) through the creation of a double moment of reference.

So, relevant for this effect is: (a) 'the date on which the document accompanied by the translation is served in accordance with the law of the Member State addressed' or (b) 'where according to the law of a Member State, a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be the date of the service of the initial document determined pursuant to Article 9(2).

Outside the situations contemplated in Article 8(3) rules Article 9 that considers as date of the service the time when a document 'is served in accordance with the law of the Member State addressed'. However, it won't be like this, according with paragraph (2), if the document has to be served within a particular period. In this situation, 'the date to be taken into account with respect to the applicant shall be that determined by the law of that Member State'.

### **9.11.2 Time delay for the service**

We can extract from Article 7(2) that it is strong the time compression of the service, clearly with a view to produce swiftness in this domain of the European judicial cooperation.

The general compromise of the receiving agency is to 'take all necessary steps to effect the service of the document as soon as possible'. The specific imposition is to effect it in 'any event within one month of receipt'.

If it has not been possible to effect service within one month of receipt, the cooperation activity is not finished and the receiving agency shall 'continue to take all necessary steps to effect the service of the document, unless indicated otherwise by the transmitting agency, where service seems to be possible within a reasonable period of time' – Article 7(2)(b). The European legislator has not given any elements to define 'reasonable period', so this concept must be filled through the notions that emerge from the professional experience and common sense of the persons responsible for such evaluation.



### 9.11.3 Proof of service<sup>23</sup>

<sup>23</sup> In the civil procedure code (Law nr. 134/2010), art. 148 and the followings, the service of the summons and of all the procedural documents will be made, ex officio, by the court procedural agents or by any other employee of this one, as well as by agents or employees of other courts, in whose circumscriptions is the person to whom the documents is served. The service is made in close envelope, having enclosed the proof of service/report and the notification. If the service is not possible, it will be made by post, registeted letter, with declared content and acknowledgment of receipt, in close envelope, having encliesd the proof of service/report and the notification. At the request of the interested party and on his expense, the service of the procedural documents will be possible to be made immediately by bailiffs. The service of the summons and of other procedural documents can be made by the court registry and by telefax, electronic mail or by other means. In order to confirm, the court, together with the procedural document, will serve a form. The courts have right of direct access at the electronic data bases or at other information systems hold by public authorities and institutions.

The following persons are summoned in this way: the staff of diplomatic missions and the Romanian citizens sent to work within the international organizations staff, as well as the family members living with them, as long as they are abroad, by the Ministry of Foreign Affairs; other Romanian citizens, found abroad in work interest, inclusively the family members accompanying them, by the central bodies who sent them; the other persons found abroad, if they have the domicile or residence known, by a summons sent by registered letter with declared content and acknowledgment of receipt, the receipt of the expedition of the letter by the Romanian post, in whose content will be mentioned the sent documents, being as evidence of the procedure accomplishment, unless otherwise provided by international treaties or conventions to which Romania is party or by special regulatory acts. If the domicile or residence of the persons found abroad is unknown/known, the summoning is made by display. In all the cases, if those from abroad have a provy known in the country, this latter one will be the only one summoned; those having the domicile or residence unknown, according to Article 162;

The persons found abroad, summoned for the first judgment, will be informed by summoning that they have the obligation to chose a domicile in Romania where all the services on the trial are to be made on them. If these ones do not observe, the services will be made by registered letter, letter service receipt at the Romanian post, in whose content will be mentioned the documents sent, taking place of proof for the procedure accomplishment.

The summoning and the other procedural documents will be sent to the party at least 5 days before the trial.

The service of the summoning and of all the procedural documents is made in person to the summoned person, at the established place or at any place the summoned person is. The summoning may be given, as the case may be, to the administrator, door keeper or to the person who usually replaces him etc.

The service of the summons will be made in person entitled to receive it, who will sign the proof of service certified by the responsible agent. If the addressee receives the summons, but refuses to sign or cannot sign it, the agent will draw up a report indicating these circumstances. If the addressee refuses to receive the summons, the agent will place it in the post box. In the absence of the post box, he will display on the addressee house door a notification and the agent will draw up a report. If the addressee is not found at his domicile or residence or, as applicable, his registered office, the agent will serve the summons to an adult of the family or, in the absence of this one, to any other adult living together with the addressee or who usually receives his correspondence. When the addressee lives in a hotel or a building composed of several apartment and is not found at this home, the agent will serve the summons to the administrator, door keeper or to the person who usually replaces him. The agent has the obligation to lodge the summons and the report at the trial court headquarters or

Since the judicial cooperation proceeding here analysed aims the transmission of knowledge and of the content of documents for formal purposes, the service needs to be demonstrated formally. Consequently, the Article 9 of the Regulation No 1393/2007 imposes the issuing of a 'certificate of service' that can show the completion of those formalities. Such certificate shall be 'drawn up in the standard form set out in Annex I and addressed to the transmitting agency, together with, where Article 4(5) applies, a copy of the document served'. This certificate needs to be completed 'in the

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at the city hall headquarters of the addressee domicile or has his registered office, these ones following to serve the summons.

The proof of service of the summons or of another procedural document or, if applicable, the report will contain several mentions referring at the drawing up date, the coordinates of the agent, addressee and court, the signatures and, in the case of the report, the indication of the reasons for which it was drawn up.

The procedure is considered accomplished on the date on which the proof] of service was signed or, as the case may be, the report was signed; in the case of the summons or service of another procedural document performed by post or rapid courier, the procedure is considered as accomplished on the signature date by the party of the acknowledgment of receipt or registration, by the post officer or by the courier of its refuse to receive the correspondence; in the case of the summons or service of another procedural document, the procedure is considered accomplished on the date indicated on the printed copy of the proof of service, certified by the court clerk who made the transmission.

When the service of the procedural documents cannot be made because the building as demolished, became impossible to live in or use or the addressee of the document still lives in it or when the service cannot be made for similar reasons, the agent will report the case to the court registry in order to inform in due time the party who asked for the service about this circumstance and to state to it to make approaches to obtain the new address to make the service.

When the plaintiff indicates, in a motivated manner, that, although he did all he could, he did not succeed to find out the defendant's domicile or another place where he could be heard according to law, the court will be able to agree his summoning by publicity. The summons by publicity is made by the display of the summons on the court door, on the portal of the competent trial court and at the last known domicile of the summoned person. In the case in which it considers necessary, the court will lodge and publish the summons in Monitorul Oficial al României or in a wide central newspaper. Together with the notification of the summons by publicity, the court will appoint a curator among the bar lawyers who will be summoned at debates for representing the defendant's interests. When the law or court orders for the parties' summoning or the service of some procedural document to be made by display, this display will be made in court by the court clerk and, outside the court, by agents responsible for the service of the procedural documents, there being concluded a report.

After the court is seized, if the parties have a lawyer or legal counsellor, the requests, defences or other documents may be served directly between them. The party present in court in person, by lawyer or by another representative is obliged to receive the procedural documents which are served at the hearing. If the reception is refused, the documents are considered served by their filing. If during the trial one of the parties changed his/her summoning place, he/she is obliged to inform the court, on the contrary the summoning procedure being validly accomplished at the former summoning place.

official language or one of the official languages of the Member State of origin or in another language which the Member State of origin has indicated that it can accept' – Article 9(2).

The certificate is issued by the receiving agency – that, in Romania, correspond to the courts of first instance (Judecătoria) – as results from the Manual that compiled the Romanian declarations and that can be consulted in the European Judicial Atlas.

If the service is performed by postal services, the reception of the registered letter is showed by an acknowledgement of receipt or equivalent.

These two documents are fundamental for procedural finalities in the context of the cross border litigation, since they mark the beginning of time delays and the knowledge of the existence of a specific procedural fact in order to allow the exercise of rights.

For instance, their content is fundamental to evaluate, where a judgement was given in default of appearance, 'if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so', for the effects of Article 34(2) of RBI – and of Article 48(1)(b) of the last proposal of revision of this Regulation. In this situation we can see that this certificate is so important that its content is decisive to determine the eventual refusal of the recognition of a judgement in the Member State of enforcement – that is the same that issues the certificate.

### **9.12 Need to surpass difficulties**

The priority is to surpass difficulties through reciprocal arrangements and close collaboration, avoiding the mere sending back of the requests.

For this reason, even if, for instance, the competence belongs to a different internal agency, the request should be directly resend to it. In this domain, the reciprocal information duties are strong and permanent – see Article 6(4) and (2). The competent agency is also bound by this duty and must inform the transmitting agency, by the swiftest possible means of transmission under the rule of Article 6(1), as if the cooperation procedure was just starting.

If the request was wrongly sent and the competence for its accomplishment belongs to an agency of a different Member State, then the request must be returned since the receiving agency has no competence to send a request not generated in its own State.

Finally, if 'the request for service is manifestly outside the scope of this Regulation or if non-compliance with the formal conditions required makes service impossible, the request and the documents transmitted shall be returned (...) to the transmitting agency' according with Article 6 (3).

### **9.13 Applicable law**

The document must be served in accordance with the law of the Member State addressed if no special request is made.

It can be also asked the service to be performed by a particular method indicated by the transmitting agency. This request must be accepted except if 'incompatible with the law of that Member State' – Article 7(1). Considering the attention given to efficacy and global answer to the needs, such incompatibility is only relevant if emerges from the collision with structural principles of the internal system or with its public policy.

### **9.14 Default**

Article 19 rules all situations of default being that this words corresponds to any situation where the defendant has not appeared. In such a context, 'judgment shall not be given until it is established' that 'the service or the delivery was effected in sufficient time to enable the defendant to defend' and that '(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation' – Article 19(1).

The judge may give judgement even if no certificate of service or delivery has been received, if, cumulatively: '(a) the document was transmitted by one of the methods provided for in this Regulation; (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document; (c) no certificate of any kind has been received, even though every reasonable effort has been made to

obtain it through the competent authorities or bodies of the Member State addressed'. This last paragraph seems difficult to understand considering the structure of the Regulation that stand on the permanent information between the actors of the judicial cooperation proceedings, the swiftness standing on strict time delays and the focusing on the effective collaboration with the judicial authorities of another State. By other side, it can represent an import escape valve of the system, protecting the parties against the fragilities of the system.

These bounds don't reach the provisional or protective measures that can always be ordered in case of urgency – Article 19(3).

It is so strong the importance given to the exercise of the rights of defence and to an fair hearing that was given to the judge the innovative power 'to relieve the defendant from the effects of the expiry of the time for appeal' under the conditions pointed out in Article 19(4).

### **9.15 Costs of service**

The question of the costs of service was problematic in the repealed Regulation 1348/2000 since it could reach more than 150 Euro, were not entirely transparent and could not be previously know.

It was deep the difference between the European systems in this area, oscillating between models of exclusive judicial intervention and systems standing on the action of private professionals. In the first, no costs were collected and in the second its reimbursement was inevitable.

That Regulation wanted to work with both systems trying to grant that it could function inside of its ruling.

In face of the pre-existent difficulties, the new Regulation consecrated the principle of the exemption of the 'payment or reimbursement of taxes or costs for services rendered by the Member State addressed' – see Article 11(1).

If the performance of the service involves the intervention of professionals that need to be paid autonomously for it, the Article 11(2)(a) imposes such payment.

The same happens if costs are occasioned by the use of a particular method of service – Article 11(2)(b).

Such payments can be asked in advance or as a reimbursement of expenses.

With the intention of fighting the previous lack of transparency and predictability, the Regulation demands that costs 'occasioned by recourse to a judicial officer or to a person competent under the law of the Member State addressed shall correspond to a single fixed fee laid down by that Member State in advance which respects the principles of proportionality and non-discrimination'. Such fixed fees need to be communicated in advance to the Commission by the Member States.

Such values are contained in the referred manual that can be found in the European Judicial Atlas in Civil Matters. From its analysis we can conclude that it is enormous the asymmetry in this domain.

There we can find that Romania declared in 2007: 'On the basis of Article 722 of the Code of Civil Procedure, service of documents is free of charge when done through the court by the process server.

Article 722:

(1) The effecting and service of procedural documents shall be carried out free of charge.

(2) The necessary expenditure for the effecting and service, by post or by other means, of the procedural documents generated by a trial shall be covered from funds allocated specifically for that purpose from the state budget. Article 90 et seq. of the Code of Civil Procedure lay down in detail how the court serves documents via the process server'.

## 10. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, including cases

The Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereinafter: the ESCP Regulation)<sup>24</sup> is intended to improve access to justice by simplifying cross-border small claims litigation in civil and commercial matters in a view of litigation costs often disproportionate to the claim value in such cases. For this purpose the Regulation lays down unified provisions on conduct of the European Small Claims Procedure (hereinafter: the ESCP) and abolishes the need for exequatur in other EU Member States.

### 10.1 Scope of Application

The scope of application of the ESCP Regulation is defined on the model of the private international law instruments. Thus, it applies in cross-border cases,<sup>25</sup> to civil and commercial matters,<sup>26</sup> whatever the nature of the court or tribunal. It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*). Therefore the claims included in its scope are contested and uncontested as well as contractual and non-contractual; however, they are limited by the claim values only to the “small claims”. Pursuant to Article 2(1) of the ESCP Regulation, the notion of “**small claims**” includes the claims whose value does not exceed 2.000 EUR, excluding all interest, expenses and disbursements (at the time when the claim form is received by the competent court).

The ESCP is available as of 1 January 2009 in all EU Member States except Denmark. The ESCP is created as an alternative to

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<sup>24</sup> OJ L 199/1 (2007).

<sup>25</sup> It should be noted here that the “cross-border” situation is understood here differently than in for instance Brussels I Regulation. The provision of Article 3 of the ESCP Regulation states that a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised.

<sup>26</sup> Certain exclusions from civil and commercial matters are listed in Article 2(2) of the ESCP Regulation.

the national procedures existing under the laws of the Member States so it is entirely at the party's option.

## **10.2 Commencement of the ESCP**

According to Article 4 of the ESCP Regulation, the ESCP is commenced by **submitting a claim** (Form A in Annex I) to the competent court. Submitting a claim is done directly by the claimant to the court, using post or any other means of communication, such as fax or e-mail, which is acceptable to the forum Member State. The claim form must include a description of supporting evidence and documents.

There are several possible reactions from the court upon receiving the claim form:

- a) In situations in which the claim falls outside the scope of the ESCP Regulation, the court informs the claimant and, unless the claimant withdraws the claim, the court proceeds in accordance with the national procedure. (This is equally applicable if the defendant files a counterclaim which is outside the scope of the ESCP Regulation at the later stage of the proceedings.)
- b) In situation in which the court finds it necessary, it may request (Form B in Annex II) the claimant to complete or rectify the claim form or to provide supplementary information or documents or to withdraw the claim, within such period as it specifies.
- c) In situation in which the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the claim form within the time specified, the court dismisses the application.
- d) In situations in which none of the above occurs, the court proceeds as explained in 1.3 below.



*A Slovenian company rented its boat to the Dutch national and resident for the period of ten days for the amount of EUR 2.500. Upon the return of the boat, the Dutch party refuses to pay the price stating that he had incurred expenses in the amount of EUR 1.100 for repairing the boat during those ten days. Not being able to agree on this issue with the Slovenian company, the Dutch party commences the proceedings under the ESCP before the Slovenian court for payment of EUR 1.000 plus the interests and the litigation costs against the Slovenian party. Upon receiving the claim, the Slovenian party files a counterclaim against the Dutch party for the payment of the boat rental price in the amount of EUR 2.500 plus the interests and the litigation costs. How should the Slovenian court to proceed?*

*Although the claim in the amount of EUR 1.000 plus the interests and the litigation costs falls under the scope of the ESCP Regulation pursuant to Article 2(1) thereof, an independent assessment has to be made with regard to the counterclaim. Under Article 5(7) of the ESCP Regulation, if the counterclaim exceeds the limit set out in Article 2(1), i.e. the amount of EUR 2.000, the claim and counterclaim shall not proceed in the ESCP, but shall be dealt with in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted. Consequently, the Slovenian court should conduct its proceedings not according to the provisions of the ESCP Regulation, but the Slovenian national procedural law applicable to situations such as this one.*

### **10.3 Conduct of the ESCP**

In addition to Article 4, Articles 5-18 of the ESCP Regulation contain specific **unified procedural provisions** on conduct of the ESCP.

For all other matters, the **subsidiary applicable procedural law** is the *lex fori*, including availability of and grounds for appeal.

Thus, the court has a duty to **notify the defendant** within 14 days. The court prepares a standard answer form (Form C in Annex III). This form, together with a copy of the claim and the supporting documents, is served on the defendant by post with dated acknowledgement of receipt. The defendant has to reply within 30 days. The court has to forward the defendant's response to the claimant within 14 days of receiving it. Any **counterclaim** submitted by the defendant (Form A in Annex I) is served on the claimant in the same way as the original claim was served on the defendant and the court proceeds in the same manner as with the original claim. According to Article 6, all forms have to be completed in the **language** of the forum, while it might be necessary to translate other documents as well.

Article 7 provides that the court has to **give judgment** within 30 days of receipt of the response from the defendant; or claimant, if there is a counterclaim. Otherwise, the court can:

- a) ask for **further information** where the parties have 30 days to reply;
- b) **take evidence** in the matter, such as through written statements of witnesses, experts or parties, but it has to use the simplest and least burdensome method. In doing so it may take evidence through video conference or other communication technology if available; or
- c) summon the parties to an **oral hearing** within 30 days. Since the ESCP is by default the written procedure, the oral hearing may be organised only if the court considers this to be necessary or if a party so requests. In the latter case, the court may refuse a request if it considers that an oral hearing is obviously not necessary for the fair proceedings. The hearing may be organised through video conference or other communication technology if available.

In these cases, the court gives its judgment within 30 days of receiving the information or holding the hearing. If the parties fail to reply in time, the court will still give its judgment.

*Under the written contract on six-month loan, the Hungarian national and resident borrowed and amount of EUR 5.000 to the Romanian resident with the obligation to return it along with 8 % interest. Upon expiry of six months, the Romanian party paid to the Hungarian one the amount of EUR 4.500 and asked the Hungarian party to allow him to pay the remaining sum within two additional months. However, the Hungarian party did not want to wait and sued before the Hungarian court for the payment of the EUR 900 under the ESCP. In the reply to the claim, the Romanian party requested the court to hold a oral hearing in order to explain the personal reasons for not being able to pay the due sum. How should the Hungarian court proceed?*

*Under the provision of Article 5(1) of the ESCP Regulation, if the court considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the case, it may reject the party's request for one. Therefore, the Hungarian court has to assess under the circumstances whether the oral hearing about the personal reasons for delay in loan repayment is at all needed in the light of the fact that there is a contract in writing with the six-month period for repayment of the loan as an essential term. If the court decides to reject this request for oral hearing, it has to state the reasons in a written decision.*

The parties need not to be represented by a legal professional. Therefore, the court cannot require the parties to make legal assessment of the claim, and has a duty to provide certain assistance such as to inform them of procedural matters where necessary.<sup>27</sup> The **litigation costs** are borne by the unsuccessful

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<sup>27</sup> Articles 10-12 of the ESCP Regulation.

party, but no unnecessary costs or those which are disproportionate to the claim will be awarded.<sup>28</sup>

Article 18 of the ESCP Regulation prescribes certain **minimum standards for review** of the judgment at the prompt request of the defendant, before the competent court in the Member States where the judgment was given. The grounds are as follows:

- a) the claim form or the summons to an oral hearing were served by a method without proof of receipt by defendant personally;
- b) the service was not effected in sufficient time to enable the defendant to arrange for his defence without any fault on his or her part; or
- c) the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part.

Depending on whether the court decides that the review is justified or unjustified on these grounds, the judgment shall be null and void or shall remain in force.

*A Romanian national and resident, employed as a surveillance worker in the Romanian company was temporary sent to Germany to work on a construction site there. During these four months in Germany, the worker concluded a gym membership contract for the duration of six months. He failed to pay the monthly fees for the two months after his return to Romania and the German company operating the gym sued him before the German courts under the ESCP Regulation for the payment of EUR 160 plus the interests and the litigation costs. He was notified of the claim by postal service, but he did not send any reply because two days after the receipt of the notification he was hit by a car and hospitalised for two months due to bad injuries. Completely unaware of the accident, the court proceeded and after expiry of 30 days*

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<sup>28</sup> Article 16 of the ESCP Regulation.

*from the worker's receipt of the claim notification, gave a judgment for the German company. A week after returning home from the hospital, the worker submitted a request for review of a judgment before the German court. Is the review justified or unjustified?*

*Pursuant to Article 18 of the ESCP Regulation, review of the judgment is allowed at the prompt request of the defendant if the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part. The issues here are: Was he prevented from objecting to the claim by reason of force majeure or extraordinary circumstances without fault on his part? Is the request for review promptly made by the worker? These answers have to give on a case-to-case-basis. One may qualify the two-month hospitalisation due to bad injuries in the car accident as an extraordinary circumstance without any fault on the part of the Romanian worker. Under the circumstances of bad injuries, the request for a review one week after the return from the hospital seems to be promptly given as well. Consequently, the review is justified and the judgment should be declared null and void.*

## **10.4 Recognition and Enforcement of the Judgment**

According to Article 20 of the ESCP Regulation, judgments delivered under the ESCP are recognised and enforced in the other Member States, **without the need for a declaration of enforceability** and without any possibility of opposing its recognition. They are enforceable regardless of the appeal.<sup>29</sup>

At the request of one party the court which gave the judgment has to issue a **certificate of judgment** without further costs (Form D in Annex IV). The party seeking enforcement has to submit before the

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<sup>29</sup> Article 15 of the ESCP Regulation.

court of the Member State where enforcement is sought, the copy of the judgment allowing verification of its authenticity, and the certificate in the Form D along with its qualified translation to the language of the Member State of enforcement if necessary. The party is not required to have an authorised representative or a postal address in the Member State of enforcement, other than with agents competent to carry out the enforcement procedure. No security, bond or deposit can be required by the court on the grounds that the applicant is a foreign national or is not domiciled or resident in the Member State of enforcement.<sup>30</sup>

The ESCP judgments cannot be reviewed as to substance in the Member State of enforcement. However, there are limited **grounds for refusal of enforcement** upon application by the person against whom enforcement is sought. These grounds refer to situations in which the ESCP judgment is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that all of the below requirements are met:

- a) the earlier judgment involved the same cause of action and was between the same parties;
- b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and
- c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the Member State where the judgment in the European Small Claims Procedure was given.

## 10.5 Service of Documents

Pursuant to Article 13 of the ESCP Regulation, documents within the ESCP are served by **postal service** attested by an acknowledgement of receipt including the date of receipt.

If such service is not possible, it may be done using any of the methods provided for in **Articles 13 or 14 of Regulation (EC) No 805/2004** of the European Parliament and of the Council of 21 April

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<sup>30</sup> Article 21 of the ESCP Regulation.

2004 creating a European Enforcement Order for uncontested claims.<sup>31</sup> Consequently, for the document instituting the proceedings or an equivalent document these methods include personal service, postal service, or service by electronic means such as fax or e-mail with the proof of the debtor's receipt or refusal. The summons to a court hearing may be served on the debtor by any of the above methods or orally in a previous court hearing on the same claim and stated in the minutes of that previous hearing. In case of service without the proof of receipt by the debtor, provided that the debtor's address is known with certainty, the available means include: personal service at personal address or business premises, deposit in the debtor's mailbox, deposit of the document at a post office with written notification of that deposit in the debtor's mailbox, postal service if the debtor's address is in the Member State of origin, electronic means attested by an automatic confirmation of delivery.

*A Romanian national and resident, employed as a surveillance worker in the Romanian company was temporary sent to Germany to work on a construction site there. During these four months in Germany, the worker concluded a gym membership contract for the duration of six months. He failed to pay the monthly fees for the two months after his return to Romania and the German company operating the gym sued him before the German courts under the ESCP Regulation for the payment of EUR 160 plus the interests and the litigation costs. He was notified of the claim by postal service, but he did not send any reply because two days after the receipt of the notification he was hit by a car and hospitalised for two months due to bad injuries. Completely unaware of the accident, the court proceeded and after expiry of 30 days from the worker's receipt of the claim notification, gave a judgment for the German company. A week after returning home from the hospital, the worker submitted a request for review of a judgment before the German court. Is the review*

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<sup>31</sup> OJ L 143/15 (2004).

*justified or unjustified?*

*Pursuant to Article 18 of the ESCP Regulation, review of the judgment is allowed at the prompt request of the defendant if the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part. The issues here are: Was he prevented from objecting to the claim by reason of force majeure or extraordinary circumstances without fault on his part? Is the request for review promptly made by the worker? These answers have to give on a case-to-case-basis. One may qualify the two-month hospitalisation due to bad injuries in the car accident as an extraordinary circumstance without any fault on the part of the Romanian worker. Under the circumstances of bad injuries, the request for a review one week after the return from the hospital seems to be promptly given as well. Consequently, the review is justified and the judgment should be declared null and void.*



## 11. Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters

The need to improve the enforcement of decisions and to establish protective measures against debtor's assets at EU level brought about the Proposal for a Regulation of the European parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (hereinafter: the proposed EAPO Regulation).<sup>32</sup> The proposed Regulation will establish a new and **self-standing European procedure** for the preservation of bank accounts titled European Account Preservation Order (hereinafter: the EAPO). The EAPO will enable a creditor to prevent the transfer or withdrawal of his debtor's assets in any bank account located in the EU. This is an alternative to procedures already existing under national laws of the EU Member States.

The proposed EAPO Regulation provides for unified provisions as regards the conditions and procedure of the issue, enforceability and enforcement of the EAPO, remedies against the EAPO, as well as auxiliary provisions concerning legal representation and litigation costs. All procedural issues not specifically dealt with in the proposed EAPO Regulation are subject to national law of the forum Member State (Article 45). Creation of the EAPO is seen as an important step in the attaining the genuine European Area of Civil Justice because the existing instruments are not sufficient in guaranteeing effective enforcement due to differences between the procedural modalities of enforcement under the national laws of the EU Member States.

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<sup>32</sup> {SEC(2011) 937 final}, {SEC(2011) 938 final}, Brussels, 25.7.2011, COM(2011) 445 final, 2011/0204 (COD), C7-0211/11 EN, accessible at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com%282011%290445\\_com\\_com%282011%290445\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282011%290445_com_com%282011%290445_en.pdf)

## 11.1 Scope of Application

The scope of the proposed EAPO Regulation largely corresponds to those of the Brussels I Regulation as it applies to civil and commercial matters having cross-border implications. The exclusions from the scope concern insolvency, social security and arbitration. In contrast to the Brussels I Regulation, the proposed Regulation will apply to matters of matrimonial property regimes, of the consequences of registered partnerships and of successions as soon as the legal instruments proposed by the Commission in these two areas have been adopted and entered into application.

The proposed EAPO Regulation envisages that the EAPO may be issued in two types of cases:

- a) before obtaining a title enforceable in the Member State where the account is located. This involves the situations where a creditor applies for the order prior to or during the judicial proceedings on the merits, or after having obtained in the Member State of origin an enforceable title which is not yet enforceable in the Member State of enforcement; and
- b) after obtaining a title enforceable in the Member State where the account is located.

The text below will discuss these two instances in parallel.

## 11.2 Issuing the EAPO

As a general rule in Articles 6 and 14 of the proposed EAPO Regulation, the courts of the Member State having jurisdiction on the substance as determined by European instruments or national law are also the **competent courts** for issuing the EAPO. Alternatively, the order can be issued by the courts of the Member State where the account is located. In this case, however, in order to avoid forum-shopping, the effect of the order is limited to the Member State where it was issued and it is not recognised and enforced in other Member States under the proposed Regulation. In cases where the creditor has already obtained an enforceable title, he or she can obtain the EAPO either from the court having issued the enforceable title or from the enforcement authority of the Member

State where the bank account is located.<sup>33</sup> The proposed EAPO Regulation provides that legal representation is not mandatory in the proceedings for obtaining the EAPO (Article 41).

Corresponding to the **conditions** established by the national laws of large majority of the EU Member States, Articles 7 and 12 of the proposed EAPO Regulation require the creditor to show:

- a) a good prospect of winning the case on the substance, i.e. that the claim is *prima facie* well-founded; and
- b) the risk that the enforcement of a (subsequent) judgment would be frustrated if the measure is not granted because the debtor risks to remove or dissipate his assets.

In addition, the court may request the creditor to provide security to ensure compensation for any damage suffered by the debtor if the EAPO is subsequently set aside as unjustifiable, such as where the creditor has no valid claim on the substance.

The EAPO would be of a protective nature only; it would only block the debtor's account but not allow money to be paid out to the creditor. To insure the "surprise effect", the EAPO will be issued in the **ex parte proceedings** (Article 10 of the proposed EAPO Regulation), so the debtor will not be informed about the application, be heard prior to the issue of the EAPO or notified of it prior to its implementation by the bank.<sup>34</sup> In line with the legal traditions of the large majority of the EU Member States, the EAPO will have an *in rem* effect, i.e. be directed against specific accounts and not at the debtor personally.

*The Austrian mobile company intends to sue its client, the Italian company, under the contract on provisions of mobile phone services for the sum of EUR 3.560 plus the interests and the litigation costs. However, on prior occasions where there was a debt by the same client, the client would evade payment by manipulating its assets in different ways. The Austrian company decides to first ask for the order freezing*

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<sup>33</sup> These provisions on jurisdiction do not prevent a claimant to seek protective measures under national law on the basis of Article 31 of the Brussels I Regulation.

<sup>34</sup> The debtor is able to contest the order after it was implemented. See 2.4 below.

*the client's accounts at an Italian bank and an Austrian bank, and then sue for the payment. Is this possible? If so, under which conditions? Which courts are competent? The Austrian bank would also like the client not to be informed of the freezing order before the order is enforced. Is this possible?*

*Under Article 5(1) of the proposed EAPO Regulation, the Austrian bank may request an EAPO prior to the initiation of judicial proceedings on the substance of the matter against the Italian client. It may do so under the conditions prescribed in Article 7(1) of the same Regulation. These conditions entail that the Austrian bank submits relevant facts, reasonably corroborated by evidence, to satisfy the court of both of the following: (a) that the claim against the defendant appears to be well founded; and (b) that without the issue of the EAPO the subsequent enforcement of an existent or future title against the defendant is likely to be impeded or made substantially more difficult, including because there is the real risk that the defendant might remove, dispose of or conceal assets held in the bank account or accounts to be preserved. Therefore, the bank will have to state all the relevant fact and submit evidence that the claim for the sum of EUR 3.560 plus the interests and the litigation costs appears to be well-founded and that if the EAPO is not issued, the later enforcement against the Italian client would impeded or substantially more difficult because the Italian client may remove, dispose of or conceal the assets held on those accounts. In doing so the Austrian bank will have to submit before the court the contract on mobile phone services with Italian client, the excerpts from its accountancy books showing that due sums have not been paid, the proofs (documents, written statements) of the formerly failed or substantially more difficult attempts to enforce the prior claims due to removal*

*of assets, etc. Based on these circumstances, the court will assess whether the conditions are fulfilled. In reference to the third question. Article 6 of the proposed EAPO Regulation provides that the courts competent to decide on the issue of an EAPO are the courts of the Member State, in which the bank account is located. Applied to the case at hand, the latter means that the Austrian courts have jurisdiction to decide on issue of the EAPO regarding the client's accounts at an Austrian bank, while the Italian courts have jurisdiction regarding the issue of an EAPO concerning the client's accounts at an Italian bank. Additionally, the courts of the Member State competent on the substance of the matter in accordance with the applicable rules on jurisdiction (in this case the rules are contained in the Brussels I Regulation, so the reference here is made to that legal instrument) are competent to issue the EAPO both in regard to the client's accounts at an Italian bank and client's accounts at an Austrian bank. The fourth question is governed by the provision of Article 10 of the proposed EAPO Regulation, which states that the defendant shall not be notified of the application or be heard prior to the issue of the EAPO, unless the claimant requests otherwise. Therefore, if the Austrian bank does not request that the Italian client be notified of the requested EAPO, the proceedings will be held ex parte.*

Given that swiftness is of crucial importance in proceedings for provisional measures, the provision of Articles 11 of the proposed EAPO Regulation only allows the taking of oral evidence in exceptional circumstances. Courts are entitled to accept **written statements** of witnesses or experts as evidence. The provision of Article 44 of provisions of the proposed EAPO Regulation also establishes specific **time-limits** for issuing and implementing the EAPO. Any delay by the enforcement authority has to be justified under the circumstances.

The provision of Article 17 of the proposed EAPO Regulation obliges the Member States to provide for a mechanism helping the creditor to **obtain information** about his debtor's account. The Member States have the choice between the two:

- a) Member States can provide for an order of disclosure obliging all banks in their territory to disclose whether the debtor has an account with them; or
- b) Member States can grant their enforcement authorities access to information held by public authorities in registers or otherwise.

Considerations of data protection entail that thus obtained personal information is limited to that necessary for enforcing and implementing the EAPO.

### 11.3 Enforcing the EAPO

The EAPO will be **automatically recognised and enforced** in another Member State without any special procedure being required (Article 23).

The EAPO is enforced by serving it on the bank or banks holding the debtor's accounts, which are under an obligation to implement the EAPO. The provisions for **service on the bank** differentiate between two situations (Article 24):

- a) if the court is situated in the same Member State as the bank, service is governed by national law;
- b) if service has to be effected across borders, this is done in accordance with the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000<sup>35</sup> with an important modification as to the method of service: The documents to be served are transmitted from the court of origin or the claimant directly to the competent authority in the Member State of enforcement

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<sup>35</sup> OJ L 324/79 (2007).

which in turn serves them on the bank or the defendant. The comparative advantage of this method of service consists in engaging the competent authorities of the Member State of enforcement. This has twofold effect: it ensures that the banks receive the order through channels with which they are familiar and it allows the competent authority to take into account *ex officio* amounts exempt from execution where that is prescribed under national law.

These two methods for service upon the banks apply *mutatis mutandis* to the service upon the defendant (Article 25). The debtor has to be notified without undue delay after the measure took effect in order to be able to arrange for his or her defence.

There are special provisions in Articles 27-30 of the proposed EAPO Regulation regulate the implementation of the EAPO by the bank, situations of several, joint or nominee bank accounts, as well as bank's costs. Likewise, the issues of amounts exempt from enforcement and ranking of competing creditors are dealt with in Articles 32 and 33.

*In a dispute on payment of the price under the sales contract between the Spanish buyer and Polish seller, the Polish court rendered a decision according to which the Spanish buyer has to pay the amount of EUR 36.580 plus EUR 3.647 in interests as well as the amount of EUR 2.250 as litigation costs to the Polish seller. Soon after the Polish court made the decision, the Polish party applies for the EAPO before the Polish court, asking it to secure the Spanish party's account at the Spanish bank. Is Polish court competent? If so, how is the EAPO issued by the Polish court enforced in Spain? May the EAPO be enforced for the entire amount: the due sum, the interests and the litigation costs? In case the amount at the account is EUR 49.258, is it possible to exempt from enforcement the amounts necessary for the payment of employees' salaries and bills of electricity, water and municipality rates?*

*The first question has to be answered on the basis of Article 18 of the proposed EAPO Regulation, according to which the EAPO issued on the basis of a judgment enforceable in the Member State of origin, the claimant shall be able to secure the amount set out in the EAPO as well as any interest and costs specified therein. Thus, if the EAPO issued by a Polish court includes all these sums, the total sum may be enforced in Spain. In regard to the second question, the provision of Article 14(1) of the proposed EAPO Regulation, in cases referred to in Article 5(2), i.e. where the claimant has obtained an enforceable judgment, that claimant may request that the court which issued the judgment also issue an EAPO. Thus, the Polish court has jurisdiction to issue an EAPO following the enforceable judgment rendered by the Polish court. The third question refers to enforcement of the Polish EAPO in Spain, and is governed by Article 23 titled "Abolition of exequatur". This Article provides that an EAPO issued in one Member State pursuant to Article 6(2) and Article 14(1) shall be recognised and enforceable in other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition. Therefore the Polish EAPO issues in the case at hand would be enforceable in Spain without any enforcement procedure. Finally, the fourth question is related to Article 32, which provides that where the law of the Member State of enforcement so provides, the amounts necessary, to ensure the livelihood of the defendant and his family, where the defendant is a natural person, or to ensure the possibility to pursue a normal course of business, where the defendant is a legal person, shall be exempt from the enforcement of the order. Applied to the case at hand, this provision may result in exemption of amounts at the Spanish account from the enforcement of an EAPO, to the extent that such an exemption is prescribed under the Spanish law.*



## 11.4 Review of the EAPO

The defendant may challenge the EAPO it on the grounds that the requirements for its issue were not met or that the claimant has failed to initiate proceedings on the substance of the matter within the time limit (Article 34). The standard form for review (Annex IV) is available in all EU languages to reduce the costs of translation. In principle, the review is lodged before the court which issued the EAPO, and exceptionally, certain aspects of the enforcement procedure, in particular the amounts exempt from execution, may be challenged before the courts of the Member State of enforcement (Articles 34 and 35). A different jurisdiction rule applies to certain categories of debtors which are generally considered to be the “weaker party” in a dispute, such as consumers, employees and insured persons. They are able to raise any objections against the order before the courts in their Member State of domicile. Right to appeal against a decision on review is governed by national law (Article 37).

*Estonian insurance company obtained, before the Estonian court, an EAPO for the amount of premium due under the insurance contract, in regard to the Czech insured person’s account at the Estonian bank. The EAPO was issued prior to the initiation of proceedings on the substance, so the Estonian court issuing it imposed on the Estonian insurance company the obligation to initiate the proceedings on the substance within 15 days from the date of issue of the EAPO. Upon expiry of 15 days, the Estonian insurance company failed to initiate the proceedings on substance, hence the Czech insured person filed the application for setting aside of the EAPO before the Czech court. Is the Czech court competent? If so, how should the Czech court proceed?*

*Although in principle the court which issued the EAPO has the competence to review it under Article 34(3) of the*

*proposed EAPO Regulation, where the defendant is an insured person (or consume or, employee), he or she may also address the application for review of the EAPO to the competent court in the Member State where he or she is domiciled. Therefore, the Czech court has jurisdiction provided that the Czech insured person has its domicile in Czech Republic. In reply to the second question, the reference is made to the provision of Article 13 which provides that, where the court set a period of time in which the claimant has to initiate the proceedings on the substance because the EAPO is issued prior to that, claimant's failure to do so will make the EAPO revocable in accordance with point (b) of Article 34(1) (or Article 35(2)). The provision of Article 34(1)(b) provides that the defendant may apply for a review of the EAPO on the grounds that the claimant has failed to initiate proceedings on the substance of the matter within the time limit referred to in Article 13. Therefore, if the Czech court finds that review is justified, i.e. that the Estonian insurance company did not initiate the proceedings on the merits; the court will set aside the EAPO pursuant to Article 34(5).*